U. S. Circuit Court. Eastern District of New York.

Fonotipia Limited and the Columbia Phonograph Company (General)	)	In Equity
versus	)	No.5/92
Winant V. P. Bradley	)	

PARTIAL RECORD, 1909

Bill / Complaint

Ex. hibit A - Circular

B Catalog

Affidavits

Edmund F. Sause

P. D. Fernandez

Paul N. Cromelin

C A L Massie

Depositions Manuel Antonio Carreno

Anderson + Cromelin

G. A Forbush

Victor N. Emerson

C A L Massie

Electrostatic copies
Archive Section - PRC
Bayonne, N.J. (RG-21)

U. S. Circuit Court. Eastern District of New York.

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versux	)	
Winant V. P. Bradley	)	

Partial Record, 1909.

Electrostatic Copies of originals in RG 21 at FRC-Bayonne (Archives Section)

Eq/5/92

IN THE CIRCUIT COURT OF THE UNITED STATES

For the Eastern District of New York.

FONOTIPIA LIMITED, and THE COLUMBIA PHONOGRAPH COMPANY, (GENERAL)

vs.

WINANT V. P. BRADLEY.

In Equity, Docket No.

On Patent No.

BILL OF COMPLAINT.

PHILIP MAURO,
C. A. L. MASSIE,
Counsel for Complainants,
Tribune Building, 154 Nassau Street, New York City.

RALPH L. SCOTT, Esq.,
Solicitor for complainants,
154 Nassau St., New York City.

Due and timely service of a copy of the within

is hereby admitted

this day of 1902

Feby 1st 1902

C. C. Buckyous, Walker and Centre Streets, New York.

otice that

in is a true copy, was duly filed and entered
e Clerk of the United States Circuit Court
District of on
day of , 190
Yours, etc.,

notice that

thin is a true copy, will be presented for
to
day of , 190
ck M., or so soon thereafter as counsel

Yours, etc.,

Sworn to before me this
day of , 190

Notary Public.

IN THE CIRCUIT COURT OF THE UNITED STATES
For the Eastern District of New York.

FONOTIPIA LIMITED, and
THE COLUMBIA PHONOGRAPH
COMPANY (GENERAL)

vs. In Equity.

WINANT V. P. BRADLEY.

BILL OF COMPLAINT.

TO THE HONORABLE THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK:

FONOTIPIA LIMITED, a British corporation, and THE COLUMBIA PHONOGRAPH COMPANY (GENERAL), a West Virginia corporation, bring this their Bill of Complaint against WINANT V. P. BRADLEY, of the Borough of Brooklyn, N. Y.

And thereupon your orators complain and say:

I.

Your orator FONOTIPIA LIMITED, is a corporation duly created and existing under and by virtue of the laws of Great Britain, and it has its principal office at No. 20 Bishopsgate Street Within, in the City of London, England; your orator THE COLUMBIA PHONOGRAPH COMPANY (GENERAL) is a corporation duly created and existing under and by virtue of the laws of the State of West Virginia, and it has its principal office in the City of Washington, D. C.; and the defendant WINANT V. P. BRADLEY, is a citizen, resident, and inhabitant of the said Eastern District of New York, and he resides at No. 3518 Avenue I, in the

Borough of Brooklyn, in the city and State of New York, within said Eastern District of New York, and said defendant is holding himself out as "sales agent" for "Continental Record Company":

II.

Each of your orators has been for a number of years and now is engaged in the talking-machine business; the said FONOTIPIA LIMITED conducting its said business in England, Italy, Germany and elsewhere on the continent of Europe; and the said THE COLUMBIA PHONOGRAPH COMPANY (GENERAL) carrying on its business within the United States and elsewhere. In the talking-machine business, disc sound-records are made by having the performer (vocalist or instrumentalist) or orchestra or band as the case may be, sing, recite or play into a suitable recording-instrument, which produces an "original" sound-record, so-called, or "original"; thereafter, electroplate reverses or matrices are obtained from said original sound-records, from which matrices in turn are obtained a great multiplicity of commercial sound-records, sometimes known as "duplicates" in order to distinguish the same from the "originals" aforesaid.

III.

Your orator the said FONOTIPIA LIMITED has acquired for large and valuable consideration the right to the exclusive services of various foreign musical artists (singers, instrumentalists, orchestras and bands) of great, and in many instances of international renown, most (if not all) of which artists are known as "Grand Opera singers" and rank as among the greatest artists of

of the world; under said contracts said artists have respectively agreed to make talking-machine sound-records exclusively for said FONOTIPIA LIMITED and for no other talking-machine concern or person whatever; and in return for such exclusive rights, said FONOTIPIA LIMITED is under contract to pay to said artists (as consideration for the exclusive nature of the rights above-mantioned) large sums of money as royalties, - the amounts of said payments being based upon the number of commercial disc records or "duplicates" manufactured.

And your orators show that the various musical artists aforesaid are very numerous and practically inaccessible at this time; wherefore your orators say that said artists are not necessary parties to this suit, inasmuch as their rights are not different and of distinct nature, and will be safeguarded under their respective agreements with your orator FONOTIPIA LIMITED.

IV.

And your orators further show that the services and qualifications of the said artists on account of their great natural gifts, special training, long experience and great renown, are special, unique, extraordinary, personal, and unreplaceable; and the possession by the said FONOTIPIA LIMITED of the exclusive rights under the contracts above referred to, constitutes an asset of exceedingly great value.

V.

And your orators further show that the quality, value and reputation of a sound-record are due not only to the musical character and popularity of the particular

selection, and not only to the musical ability and renown of the famous artist who sings or performs such selection in making the original sound-record, - but also to the methods and processes employed in the laboratory in "taking" such original recordings, and to the processes and apparatuses subsequently employed in obtaining therefrom the mother shells or matrices, and likewise to the construction and adaptation of the talking-machines used in the laboratory for such original recordings, many valuable details and improvements in which have been developed by your orators during their long experience and at great expense; and further to the knowledge, skill, and experience of the high-priced experts who supervise or direct (or "take") the original recording by such artists; and that such services by said experts are unique, special, extraordinary, personal, and unreplaceable; and that said processes, methods, apparatuses, and machines contain many features in the nature of trade secrets.

VI.

And your two orators FONOTIPIA LIMITED and THE COLUMBIA PHONOGRAPH COMPANY (GENERAL) have mutually covenanted and agreed, under the laws of England, that said THE COLUMBIA PHONOGRAPH COMPANY (GENERAL) shall have within the United States of America and Canada the exclusive right to make or cause to be made, to use, and to sell, the disc sound-records made for said FONOTIPIA LIMITED by the said artists under the said exclusive contracts with them, under the following arrangement, viz: First, said FONOTIPIA LIMITED to deliver to said THE

COLUMBIA PHONOGRAPH COMPANY (GENERAL) the original "mother shells" (that is, the electroplate reverses or "matrices") of the original sound-records made for said FONOTIPIA LIMITED by the artists above referred to, under the aforesaid exclusive contracts with them; second, the said THE COLUMBIA PHONOGRAPH COMPANY (GENERAL) to cause stamping matrices to be obtained from said mother shells, and from said stamping matrices to impress a multiplicity of commercial disc sound-records, or "duplicates", of said records; third, the said THE COLUMBIA PHONOGRAPH COMPANY (GENERAL) to pay to said FONOTIPIA LIMITED, in consideration of the premises, large sums of money based upon the number of "duplicates" or commercial records made as aforesaid, and in addition thereto to further pay to said FONOTIPIA LIMITED the same royalties which the latter is already under contract to pay to the aforesaid artists, (under its exclusive contracts with them), - in short, THE COLUMBIA PHONOGRAPH COMPANY (GENERAL) aforesaid to pay a double substantial royalty upon each and every such sound-record made by it, one of said royalties to be retained by the said FONOTIPIA LIMITED, and the other to be transmitted to the aforesaid artists; and fourth, said FONOTIPIA LIMITED not to import any of its said records into the United States or Canada, and said THE COLUMBIA PHONOGRAPH COMPANY (GENERAL) not to export any of its said records out of the United States or Canada.

VII.

And your orators further show that the said exclusive contracts between said FONOTIPIA LIMITED and the various artists above referred to, and likewise the said exclusive contract between your two orators, have been

acted upon and carried out faithfully up to the present time, and are still subsisting to the entire satisfaction and great benefit of all the parties thereto; and your orators have already expended vast sums of money and great efforts in the building up and carrying on of the business provided for by said contracts; that the artists referred to have been paid large sums of money as royalties, as aforesaid; that the sound-records produced under said contracts have become widely and most favorably known throughout this country and abroad as "FONOTIPIA RECORDS", or "COLUMBIA RECORDS, FONOTIPIA SERIES", and enjoy the very highest reputation for superior quality; and in particular your orator THE COLUMBIA PHONOGRAPH COMPANY (GENERAL) has expended in this country vast sums of money in making and placing on the market and in advertising here the said "COLUMBIA RECORDS, FONOTIPIA SERIES", has sold large numbers thereof in this country, and has paid to said FONOTIPIA LIMITED large sums of money under said exclusive contract between your two orators, and has built up in this country and is still carrying on a large and exceedingly valuable business in making and advertising and selling said COLUMBIA RECORDS, FONOTIPIA SERIES" under said exclusive rights. And your orators further show that the value of the exclusive rights aforesaid in this country and of the going business in this country built up and now maintained and existing under the same is very great; and that the value or amount of the subject-matter of this controversy, exclusive of costs, is largely in excess of the jurisdictional amount of Two Thousand Dollars.

VIII.

And your orators further show that the said "Columbia Records, Fonotipia Series" put out in this countr by said THE COLUMBIA PHONOGRAPH COMPANY (GENERAL) have acquired and now enjoy a very high and justly-deserved reputation for superior quality; that large numbers of them have been made and sold in this country; that a great demand exists here for the same, which demand your orator the said THE COLUMBIA PHONOGRAPH COMPANY (GENERAL) has created and is ready and able to supply; and that, but for the wrongs hereinafter complained of, your orators would continue to enjoy large gains and profits by reason of the great business and good-will built up by them under and by virtue of the exclusive nature of the said rights - and by reason of the special, unique, extraordinary, personal, and unreplaceable nature of the services rendered by the musical artists and by the expert "takers" above referred to - and by reason of the special and excellent nature of the processes, methods, apparatuses, and machines aforesaid employed in making the same - and by reason of the vast sums of money expended in the premises by your orators.

IX.

And now your orators are advised and believe, and therefore aver, that the defendant WINANT V. P. BRADLEY, and others conspiring and confederating with him, whose names are at this time unknown to your orators (but whom, when discovered, your orators ask leave to implead as parties defendant herein), well knowing the premises and the exclusive rights of your orators, are

preparing and threatening to injure and destroy your orators' exclusive rights in the premises, and to divert to themselves the large gains and profits to which your orators are justly entitled and would otherwise receive but for the threatened wrongs of said defendant and his associates, - by placing on the market in this country counterfeits or spurious imitations copied from said sound-records made (by the processes, methods and apparatuses aforesaid) for your orators by the musical artists and expert "takers" aforesaid (under the exclusive rights aforesaid), and offering the same for sale at prices greatly below the prices now being willingly paid by the public and received by your orator THE COLUMBIA PHONOGRAPH COMPANY (GENERAL) for its genuine "Columbia Records, Fonotipia Series". In order to obtain such counterfeits, it is not necessary to employ the services of the famous artists or of the high-priced experts referred to, or the valuable processes, methods and apparatuses referred to; but, instead thereof, such counterfeits can be obtained by merely electroplating at a trifling cost a commercial disc sound-record, and then using such electroplate (or further electroplates or stamping-matrices obtained therefrom in the same manner) for stamping out counterfeit records by the thousand, which latter will be practically indistinguishable from the genuine "Fonotipia Records" or "Columbia Records, Fonotipia Series" of your orators; and your orators are advised and believe, and therefore aver, that the foregoing is the method by which said defendant is threatening and preparing to produce his so-called "Continental Grand Opera Disc Records". And unless the said defendant and his associates be enjoined from so

doing, the placing on the market of such counterfeit or imitation sound-records will not only deprive your orator, THE COLUMBIA PHONOGRAPH COMPANY (GENERAL) of its legitimate gains and profits, but will further deprive your orator FONOTIPIA LIMITED (and the artists above mentioned) of the legitimate compensation and royalties they are entitled to and would receive but for the wrongs complained of.

X.

And as an instance of the wrongs aforesaid and of the threats and preparations to injure and destroy your orators' business, your orators have been informed and believe, and therefore aver, that the defendant WINANT V. P. BRADLEY is distributing catalogues and circulars addressed to the talking-machine trade and ~~also catalogues~~ relating to his so-called "Continental Grand Opera Disk Records"; which are alleged in said circulars to be "made in this country from Mother records imported from foreign countries", - said circulars giving "prices by artists", and soliciting orders from the trade for said so-called "Continental Grand Opera Disk Records". The catalogue referred to in said circulars is a printed folder reciting that: "Following is a forecast of a Catalogue, now in press, of a list of ten inch disc records", and that "These records are all duplicates from original records made by the artists whose names are used" in said catalogue, and that they "are equal to the originals in all respects". Among the artists named in the said circular and likewise in the said Catalogue are the following artists who are under exclusive contract with said FONOTIPIA LIMITED, viz: Mmes. Pinkert, Burzio, Maria

Barrientos, Regini Pacini, Armida Parsi-Pettinella, Giannina Russ, and Salomea Krusceniski; and Signors Alessandro Bonci, Adam Didur, Antonia Magini-Coletti, Giovanni Zenatello, Mario Sammarco, Riccardo Stracciari, Francisco Vignas, Oreste Luppi, Giuseppe Anselmi, Amedeo Bassi, and Carlos Dani.

The defendant's aforesaid circular offers the records by the foregoing artists at sixty cents (60¢) each, whereas your orator THE COLUMBIA PHONOGRAPH COMPANY (GENERAL) is now listing its said genuine "Columbia Records, Fonotipia Series" by the artists above-named at two dollars and a half ($2.50) for each such record.

XI.

And your orators further show that if the defendant's spurious Grand Opera disc records are in fact made from the so-called "Mother records" (as alleged by said defendant) and are in fact all duplicates from original records made by the artists whose names are above set forth (as alleged by said defendant), then such counterfeit records are indeed practically indistinguishable from the genuine "Columbia Records, Fonotipia Series" (as likewise implied by the defendant's said circular and catalogue). And defendant's offer to sell the same at less then one-fourth your orators' list price will cause the purchasing public in this country to refrain from buying the genuine "Columbia Records, Fonotipia Series" from your orator THE COLUMBIA PHONOGRAPH COMPANY (GENERAL), to the great injury of both of your orators; and will induce the public to purchase from the said defendant to his enormous profit; and the mere putting out of the said circular and Catalogue, and the mere

advertising and offer to sell such counterfeits (even without the actual placing on the market of the counterfeit Grand Opera records therein set forth), will greatly and irreparably injure the reputation, good-will, and business which your orators have built up and are now maintaining under the exclusive rights aforesaid.

XII.

Whether or not the "Mother records" referred to in the said circular of said defendant have been imported from foreign countries (as alleged by said defendant) or have been made in this country, is unknown to your orators; and whether or not the said defendant has already made or placed on the market or sold any of the spurious sound-records above referred to, is likewise unknown at this time to your orators. Wherefore your orators pray leave to set forth the true facts in this regard, if the same should become known to them and should be deemed material.

XIII.

And your orators further show that the acts and preparations of this defendant will, unless enjoined by this Honorable Court, encourage others to venture to infringe your orators' said exclusive rights in an attempt to divert to themselves a portion of the profits which should and otherwise would flow to your orators, to the great and irreparable damage and possible destruction of the good-will and business built up and maintained by your orators in the premises.

XIV.

Your orators annex hereto a specimen of defendant's said circular and of his said forecast of catalogue, as Complainant's Exhibits A and B respectively; and your orators will present in Court specimens of the catalogues of your orators "Fonotipia Records" and "Columbia Records, Fonotipia Series" aforesaid.

Wherefore, and forasmuch as your orators are without relief save in this Honorable Court, they pray as follows:

1. That a perpetual injunction may issue out of and under the seal of this Honorable Court directed to the said defendant WINANT V. P. BRADLEY, his associates, attorneys, privies, agents, clerks, servants, and workmen, and each of them, commanding and enjoining them perpetually that they shall not, either directly or indirectly, counterfeit or duplicate any "Fonotipia Record" or any "Columbia Record , Fonotipia Series", or any sound-record made by (or containing a selection recorded by) any artist under exclusive contract with your orator said FONOTIPIA LIMITED, - or any sound-record put out by either of your orators; and that they shall not, either directly or indirectly, offer or advertise that they will do so, or put out any circulars or catalogues like or similar to the circular and catalogue above referred to or containing statements similar to those complained of therein; and that they shall not, either directly or indirectly, attempt to divert to themselves, or to injure, the business and good-will built up and now maintained by your orators in the premises.

2. That a preliminary injunction, and likewise a temporary restraining order, issue to the same purport, tenor, and effect as hereinbefore prayed for with regard to said perpetual injunction;

3. That the said defendant WINANT V. P. BRADLEY his associates, attorneys, privies, agents, clerks, servants, and workmen, and each of them, be directed to

deliver up to the Marshal of this Court, in advance of the hearing, and to be destroyed after the hearing (in such manner as this Court may order), any and all such counterfeit sound-records, and any and all matrices and other appliances for making the same, that may be in the possession or under the control of them or of any of them, and likewise any and all advertising matter, catalogues or the like, relating to such counterfeit sound-records;

4. That your orators need not be required to join with them as parties complainant any of the various artists above referred to;

5. That your orators be permitted to unite herein as parties defendant such other persons or concerns as they may hereafter ascertain to be aiding and abetting the said defendant WINANT V. P. BRADLEY in the acts herein complained of.

6. That this cause be referred to a Master for an accounting, to ascertain and report the number of counterfeit sound-records put out by the said defendant WINANT V. P. BRADLEY, with the radial dimension of each, and likewise the profits received by the defendant and his associates by reason of the unlawful acts herein complained of, and the damages caused your orators in the premises; and that the said defendant WINANT V. P. BRADLEY be required to pay to THE COLUMBIA PHONOGRAPH COMPANY (GENERAL) aforesaid the profits and damages so reported by said Master, and that one of your orators, THE COLUMBIA PHONOGRAPH COMPANY (GENERAL) aforesaid, be authorized to receive the said amounts for itself and its co-complainant your orator FONOTIPIA LIMITED; and

7. That your orators may recover from defendant their costs in this behalf, and may receive such other and further relief as to this Court may seem just.

To the end that the said defendant, WINANT V. P. BRADLEY, may, if he can, show why your orators should not have the relief hereby prayed, and may full, true and direct answer make - but not under oath, answer under oath being expressly waived - according to the best and utmost of his knowledge, information, remembrance and belief, to the several matters hereinbefore averred and set forth, as fully and particularly as if the same were repeated paragraph by paragraph, and said defendant thereto severally and specifically interrogated, may it please your Honors to grant unto your orators a writ of subpoena ad respondendum issuing out of and under the seal of this Honorable Court, directed to the said defendant, WINANT V. P. BRADLEY, commanding him to appear and make answer to this bill of complaint and to perform and abide by such order and decree as to this Court may seem just.

And your orators will ever pray.

Ralph L. Scott,
Solicitor for Complainants,
154 Nassau St.,
Borough of Manhattan,
New York City.

FONOTIPIA LIMITED,

By

Its Attorney-in-Fact for the purpose of this suit.

Philip Mauro,
Counsel for Complainants.

THE COLUMBIA PHONOGRAPH COMPANY (GENERAL),

By

President.

COMPLAINANTS' EXHIBIT A, SPECIMEN
OF DEFENDANT'S CIRCULAR.

WINANT V. P. BRADLEY

SALES AGENT TO THE MANUFACTURER

IMPORT. DOMESTIC. EXPORT.

3518, Avenue I, Brooklyn Borough, New York, U.S.A.

To the Talking Machine Trade;

Gentlemen;

In re Continental Grand Opera Disk Records

I hand you herewith catalog of Continental Disk Records, made in this country from Mother records imported from foreign countries. These records are equal to the very best now on this market in all respects. Prices by artists as follows;

Michailowa, De Gogorza, Journet, and Blauvelt at------40¢,. each.

Caruso, Schuman-Heink, Gadski, Abbott. Plancon, Scotti, Campanari, Neilson, Constantino, Pinkert, Burzio, Mangini-Coletti, Zanatello, Didur, Barrientos, Sammarco, Ponci, Straccieri, Barrientos, Pacini, Parsi-Pettinella, Vignas, Luppi, Castelleno, Powell, Von Rooy, at------60¢,. each.

I shall hope to receive your esteemed order.

Yours truly,
WINANT V. P. BRADLEY, Sales Agent.

Continental Record Company,
New York City. U.S.A.

P.S. I am selling agent for the STAR line of disc talking machines, shall I quote you?

COMPLAINANTS' EXHIBIT B, SPECIMEN OF DEFENDANT'S CATALOGUE OR PRICE LIST.

1/22/09

FOLLOWING is a forecast of a Catalogue, now in press, of a list of ten inch disc records.

These records are all duplicates from original records made by the artists whose names are used herein. They are equal to the originals in all respects, including composition and finish.

The forthcoming catalogue will comprise all of the best and most popular foreign records, made by the most noted singers.

COMPLAINANTS' EXHIBIT B, SPECIMEN OF DEFENDANT'S CATALOGUE OR PRICE LIST.

ALICE NIELSEN, *Soprano*

Number
750 Traviata—Addio del passato (Farewell to the Bright Visions) Verdi

with orchestra

MARCEL JOURNET, *Bass*

775 Faust—Le veau d'or (The Calf of Gold) Gounod

POL PLANCON, *Bass*

800 Marta—Canzone del porter (Italian) Flotow

801 Noël (Holy Night) Adam

EMILIO DE GOGORZA, *Baritone*

825 For All Eternity (English)

826 Barbiere—Largo al factotum (Room for the Factotum) Italian Rossini

ANTONIO SCOTTI, *Baritone*

850 Pagliacci—Prologo (Prologue) Leoncavallo

GIUSEPPE CAMPANARI, *Baritone*

875 Trovatore—Il balen (Her Sweet Glances) Verdi

JOHANNA GADSKI, *Soprano*

900 Walküre—Brunnhilde's Battle Cry (German) Wagner

with orchestra

BESSIE ABOTT, *Soprano*

925 Martha—Qui sola vergin rosa (Last Rose of Summer) In Italian Flotow

MARIE MICHAILOWA, *Soprano*

950 Freischutz—Air Weber

Number
951 Traviata—Addio del passato (Farewell to the Bright Visions) Verdi

with flute obbligato—

953 Pearl of Brazil Thou Brilliant Bird David

with violin obbligato—

954 Ave Maria Grounod

with 'cello obbligato

955 Cradle Song Napravnik

H. EVAN WILLIAMS, *Tenor*

975 A Dream Bartlett

MAUD POWELL, *Violinist*

1000 Melodie Gluck

1001 Souvenir Drdla

DISC RECORDS, 10¾ INCHES

GIUSEPPE ANSELMI, *Tenor*

250 Cavalleria Rusticana (Mascagni) Siciliana di Turiddu (O Lola ch'hai di latti)

251 Don Giovanni (Mozart) Aria di Ottavio (Il mio tersoro intanto)

252 Fedora (Giordano Arioso di Loris (Amor ti vieta)

253 I Pagliacci (Leoncavallo) Arioso di canio (Vesti la giubba)

254 Rigoletto (Verdi) Aria del Duca Parte II, (Parmi veder le lacrime)

MARIA BARRIENTOS, *Soprano*

300 Dinorah (Meyerbeer)—Aria di Dinorah, Part I (Ombra leggera)

COMPLAINANTS' EXHIBIT B, SPECIMEN OF DEFENDANT'S CATALOGUE OR PRICE LIST.

Number

301 Fra Diavolo (Auber)—Cavatina di Zerlina (Or son sola, alfin respiro)

302 La Sonnambula (Bellini)—Cavatina di Amnia Parte I, Aria (Come per me sereno)

AMEDEO BASSI, *Tenor*

325 Fedora (Giordano)—Arioso di Loris (Amor ti vieta)

ALESSANDRO BONCI, *Tenor*

350 Aida (Verdi)—Romanza di Radames (Celeste Aida)

351 Don Pasquale (Donizetti) Aria di Ernesto (Cerchero lontana terra)

352 I Pescatori di Perle (Bizet)—Romanza di Nadir (Mi par d'udir ancora)

353 I Puritani (Bellini)—Cantabile di Arturo (A te, o cara)

362 Zaza (Leoncavallo)—Romanza di Milio (Maipin Zaza)

354 L'Africana (Meyerbeer)—Aria di Vasco (O Paradiso)

355 L'Elisir d'amore (Donizetti—Cavatina di Nemorino (Quanto e bella)

356 Manon Lescaut (Puccini)—Romanza di Des Grieux (Donna non vidi mai)

357 Lucia di Lammermoor (Donizetti—Cabaletta di Edgardo (Tu che a Dio Spiegasti l'ali)

358 Marta (Flotow)—Romanza di Lionello (M'appar)

359 Rigoletto (Verdi)—Balla del Duca (Questa o quella)

Number

360 Werther (Massenet)—Stanze de Ossian (Ah, non mi ridestar)

361 Ave Maria (Gounod)—con accompagnamento di violino organo e pianoforte

CARLO DANI, *Tenor*

400 Manon (Marsenet)—Sogno Di Des Grieux (Chiudo gli occhi)

ADAM DIDUR, *Bass*

425 Faust (Gounod)—Strofe di Mefistofele (Dio dell'or)

426 Mefistofele (Boito)—Prologo (Ave, Signor)

427 Vita bretone (Mugnone)—Canz. di Papa Silvestro (Vivea nel tempo antico) con accomp. di violino

SALOMEA KRUSCENISKI, *Soprano*

450 Adriana Lecouvreur (Cilea)—Aria dei fiori (Poveri fior)

ORESTE LUPPI, *Bass*

475 Ernani (Verdi)—Cavatina di Silva (Infelice! e tuo credevi)

476 Stabat Mater (Rossini)—Pro peccatis, con accompagnemento d'organo

ANTONIO MAGINI-COLETTI, *Baritone*

500 Carmen (Bizet)—Strofe di Toreador (Con voi ber)

COMPLAINANTS' EXHIBIT B, SPECIMEN OF DEFENDANT'S CATALOGUE OR PRICE LIST.

Number

501 La Danza (Rossini)—Tarantella (Gia la luna in messo al mare)

502 Rigoletto (Verdi)—Aria di Rigoletto, Part I (Il sol per me non ha piu raggi)

503 Lucia di Lammermoor (Donizetti)—Cavatina di Enrico (Cruda, funesta smania)

REGINI PACINI, *Soprano*

525 Il Barbiere di Siviglia (Rossini)—Cavatina di Rosina, Part I, Aria (Una voce poco fa)

526 Il Flauto magico (Mozart)—Aria di Regina (Gli angui d'inferno)

527 Ave Maria (Gounod)—con accompagnamento di violino

528 Variazioni (Proch)—Deh torna, mio bene

529 Mirella (Gounod)—Valzer (Oh! d'amor messaggera)

ARMIDA PARSI-PETTINELLA, *Contralto*

550 Carmen (Bizet)—Seguidilla (la sul bastion di Siviglia)

551 Mignon (Thomas)—Romanza di Mignon (Non conosci il bel suol)

552 La Gioconda (Ponchielli)—Romanza della Cieca (Voce di donna o d'angelo)

NUMBER

GIANNINA RUSS, *Soprano*

575 La Forza del destino (Verdi)—Finale II (La Vergine degli angeli) con coro

576 Leggenda Valacca (Braga)—Oh quali mi risvegliano, con acc. di violino e pianoforte (Violino, Alessandro Genesini)

MARIO SAMMARCO, *Baritone*

600 Adriana Lecouvreur (Cilea)—Monologo di Michonnet (Ah! stupenda, mirabile)

601 Tannhauser (Wagner)—Romanza di Volframo (Oh tu bell astro incantator)

RICCARDO STRACCIARI, *Baritone*

625 Aida (Verdi)—Sortita d'Amonasro (Quest'assisa ch'io vesto)

626 Lucia di Lammermoor (Donizetti)—Cavatina di Enrico (Cruda, funesta smania)

FRANCISCO VIGNAS, *Tenor*

650 Lohengrin (Wagner)—Addio di Lohengrin (Cignofedel)

651 L'Africana (Meyerbeer)—Aria di Vasco (O Paradiso)

GIOVANNI ZENATELLO, *Tenor*

675 Otello (Verdi)—Morte d'otello (niun mi tema)

COMPLAINANTS' EXHIBIT B, SPECIMEN OF DEFENDANT'S CATALOGUE OR PRICE LIST.

NUMBER

676 La Traviata (Verdi)—Aria di Alfredo (De' miei bollenti spiriti)

677 La Traviata (Verdi)—Scena della borsa (Questa donna conoscete?)

678 Manon Lescaut (Puccini)—Romanza di Des Grieux (Donna non vidi mai)

DUETS

700 I Pescatori di perle (Bizet)—Atto. I. Duetto Nadir-Zurga (Del tempio al limitar)
Bonci, Magini-Coletti

701 Il Trovatore (Verdi)—Atto IV. Duetto Eleonora-Conte Part I. (Qual Voce)
Burzio, Magini-Coletti

725 La Favorita (Donizetti)—Atto I Coro d'intro-

725 La Favorita (Donizetti)—Atto. I. Coro d'introduzione (Ball'alba foriera)
Coristi Delma Scala

FOR DISCOUNTS ADDRESS
VINANT V. P. BRADLEY,
Sales Agent,
5018 Avenue I, Brooklyn, N. Y.

SAUSE AFFIDAVIT FOR USE IN A SUIT ABOUT TO BE BROUGHT IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK BY FONOTIPIA LIMITED AND THE COLUMBIA PHONOGRAPH COMPANY (GENERAL) against WINANT V. P. BRADLEY.

IN THE CIRCUIT COURT OF THE UNITED STATES

For the Eastern District of New York.

FONOTIPIA LIMITED and THE
COLUMBIA PHONOGRAPH COMPANY
(GENERAL)

vs. In Equity.

WINANT V. P. BRADLEY.

SAUSE AFFIDAVIT.

State of New York,)
: ss:
County of New York,)

EDMOND F. SAUSE, being duly sworn, deposes and says: I am of lawful age and am Assistant Manager of the Export Department of the Columbia Phonograph Company (General), one of the complainants herein, at 154 Nassau Street, New York City.

Recently I had an oral interview with Mr. P. D. Fernandes, of the house of Thomsen & Co., No. 90-96 Wall Street, this City, who told me that a gentleman named Bradley had called at his place of business soliciting orders for said Bradley's so-called Continental Grand Opera Disc Records, and had left with said Fernandes a certain circular (or price-list) and also a catalogue, both relating to said sound-records. At my request Mr. Fernandes mailed to me, under date of January 13, 1909, the said

circular and catalogue. I have delivered the same to complainants' counsel, Mr. Massie, marking thereon my initials and the date of this affidavit.

Edmund D. Sauer.

Subscribed and sworn to before me this 22nd day of January, 1909.

Ralph L. Scott.
Notary Public,
New York County.

(SEAL)

FERNANDES AFFIDAVIT FOR USE IN A SUIT ABOUT TO BE BROUGHT IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK BY FONOTIPIA LIMITED AND THE COLUMBIA PHONOGRAPH COMPANY (GENERAL) against WINANT V. P. BRADLEY.

IN THE CIRCUIT COURT OF THE UNITED STATES

For the Eastern District of New York.

FONOTIPIA LIMITED AND THE
COLUMBIA PHONOGRAPH COMPANY
(GENERAL)

vs. In Equity.

WINANT V. P. BRADLEY.

FERNANDES AFFIDAVIT.

State of New York,)
: SS.:
County of New York,)

P. D. FERNANDES, being duly sworn, deposes and says: I am of lawful age and am a resident of the City of New York, N. Y. On or about January 9th, 1909, I received a call from Mr. Winant V. P. Bradley, of Broollyn. Mr. Bradley was soliciting orders from me for certain Continental Grand Opera Disc Records at sixty cents (60¢) each, and in connection therewith he left with me during the course of his said visit a (typewritten) circular on one page and a printed catalogue; and from said catalogue I ordered by number four records, as follows:

Pagliacci (Prologue), purporting to be sung by Antonio Scotti, and bearing the number 850;

Monon Lescaut, sung by Bonci, and bearing the number 356;

La Traviata, sung by Zenatello, and bearing the number 676; and

La Sonnambula **Cavatina,** Part I, sung by Madame **Barrientos,** and bearing the number 302.

Thereafter, I told the foregoing to Mr. Edmond F. Sause, of the Columbia Phonograph Company (General); and at his request, on or about January 13, 1909, I mailed said circular and catalogue to him.

And, on January 29, 1909, I received the four records so ordered, and have scratched thereon my initials and date thereof, and delivered the same to Mr. Massie, of counsel for complainants herein. Done up in the package containing the four records was another copy of printed catalogue, the same as the catalogue above referred to.

L. H. Fernandes

Subscribed and sworn to before me
this 30th day of January, 1909.

Ralph L. Scott,
Notary Public,

(SEAL) New York County.

CROMELIN AFFIDAVIT FOR USE IN A SUIT ABOUT TO BE BROUGHT IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK BY FONOTIPIA LIMITED AND THE COLUMBIA PHONOGRAPH COMPANY (GENERAL) AGAINST WINANT V. P. BRADLEY.

IN THE CIRCUIT COURT OF THE UNITED STATES

For the Eastern District of New York.

FONOTIPIA LIMITED AND
THE COLUMBIA PHONOGRAPH
COMPANY (GENERAL)

vs. In Equity.

WINANT V. P. BRADLEY.

CROMELIN AFFIDAVIT.

State of New York,)
: SS.:
County of New York,)

PAUL H. CROMELIN, being duly sworn, deposes and says: I am one of the Vice-Presidents of The Columbia Phonograph Company (General). I have read the Bill of Complaint herein and know the contents thereof, and the same is true of my own knowledge save as to the matters therein stated to be alleged upon information and belief, and save as to some of the allegations regarding Fonotipia Limited, - as to all of which matters I believe the Bill of Complaint to be true.

I.

Of my own knowledge I know of the existence of the contract between the two complainants, as alleged in the Bill of Complaint, because I negotiated the same with

said Fonotipia Limited on behalf of my company, and executed the same for the latter; and my knowledge as to the existence of the exclusive contracts with the Grand Opera singers referred to in the Bill, is because I satisfied myself on that point before executing said contract between the two companies.

I further know of my own knowledge that royalties upon the sound-records made by my company, under the contracts between the two complainants, have been paid to said Fonotipia Limited at a substantial price for eachand every such sound-record which said The Columbia Phonograph Company (General) has caused to be made, and a further substantial sum has been paid by my company to said Fonotipia Limited as royalty for each and every such record, to be transmitted by said Fonotipia Limited to the various artists, - said royalties aggregating thousands of dollars.

I further know of my own knowledge that vast sums of money - thousands and thousands of dollars - have been expended by said Columbia Phonograph Company (General) in making its said "Columbia Records, Fonotipia Series", and in advertising the same and placing them on the market.

II.

I have been in the talking-machine business continuously since about the year 1896. During the period from 1899 to 1903, I was located in Europe, principally in Berlin, and was engaged in that business; and continuously ever since I have been located in this country. I have made it my business to keep myself informed as to the

conditions and requirements of the talking-machine trade, and as to its general development. From my long experience in this business, I am of the opinion, and I unhesitatingly state, that the business of The Columbia Phonograph Company (General) in putting out its "Columbia Records, Fonotipia Series" is an exceedingly large and valuable one; that the high standing and well deserved reputation of the artists referred to in the Bill of Complaint, the exclusive nature of the contracts with those artists, and the high quality of the "Columbia Records, Fonotipia Series", constitute an exceedingly valuable asset. From the same experience and observation, I am further of the opinion, and therefore unhesitatingly assert, that if this defendant be permitted to duplicate or counterfeit the records made by the artists referred to, it will irreparably injure and almost entirely destroy said large and valuable business of my Company; and that the mere circulating of the trade with advertisements offering to sell at the reduced prices the records made by the aforesaid Grand Opera singers, will unsettle the market, and will of itself greatly and irreparably injure the aforesaid business of my company.

III.

I am familiar with the "Columbia Records, Fonotipia Series" put out by the complainants herein. All or nearly all of said records contain impressed therein an exact reproduction of the autograph signature of the artists, who traced his (or her) signature directly into the wax-like composition of the "original" at the time of singing the record. This signature would appear upon the electroplate reverse in the form of a raised edge, and, of course, would be impressed into the "duplicate" or

commercial record. I produce herewith a specimen of one of such duplicates, showing the reproduction of Madame Regina Pacini's signature. Where the paper label covers her impressed signature, it can nevertheless be seen by placing the eye at an acute angle to the surface of the disc.

I have examined Complainants' Exhibit B, Specimen of Defendant's Catalogue, in connection with my company's catalogue, and I find that every one of the selections listed by defendant as made by the artists named in the Bill of Complaint as being under exclusive contract with complainants, is a specially-executed selection put out by my company and listed on its catalogue. The correspondence between these fifty-six (56) selections indicates to me that defendant's records are counterfeits made from our own genuine records. I set out below in parallel columns the defendant's listed records, and opposite each I indicate the place where the same is listed in complainants' catalogue which I submit herewith.

Dfts. Catalogue No.	Artist	Selection	Complts' Catalogue No. & Page	
250	Anselmi	Cavalleria	F-3	16
251	"	Don Giovanni	F-5	17
252	"	Fedora	F-4	15
253	"	Pagliacci	F-2	16
254	"	Rigoletto (II)	F-1	15
300	Barrientos	Dinorah (I)	F-6	38
301	"	Fra Diavolo	F-7	39
302	"	Sonnambula(I)	F-8	39
325	Bassi	Fedora	F-9	24
350	Bonci	Aida	F-12	8
351	"	Don Pasquale	F-16	7
352	"	Pescatori	F-16	7
353	"	Puritani	F-20	12

(Defendant)		(Complainants)		
362	(Bonci)	Zaza	F-12	8
354	"	Africana	F-11	9
355	"	Elisir D'Amore	F-18	12
356	"	Manon Lescaut	F-19	11
357	"	Lucia di Lamm'r	F-14	8
358	"	Marta	F-15	10
359	"	Rigoletto	F-10	9
360	"	Werther	F-15	10
361	"	Ave Maria	F-13	10
400	Dani	Manon	F-22	44
425	Didur	Faust	F-23	27
426	"	Mefistofele	F-24	28
427	"	Vita bretone	F-25	28
450	Kruscenisk	Adriana Lecouvreur	F-26	43
475	Luppi	Ernani	F-31	42
476	"	Stabat Mater	F-32	42
500	Magnini-Coletti	Carmen	F-33	37
501	"	La Danza	F-34	36
502	"	Rigoletto (I)	F-36	35
503	"	Lucia di Lamm'r	F-35	36
525	Pacini	Barbiere di Sivg	F-40	29
526	"	Flauto Magico	F-38	30
527	"	Ave Maria	F-39	29
528	"	Variazioni	F-37	30
529	"	Mirella	F-41	29
550	Parsi-Pettinella	Carmen	F-43	33
551	"	Mignon	F-44	33
552	"	Gioconda	F-42	32
575	Russ	Forza del Destino	F-45	25
576	"	Leggenda Valacca	F-46	26
600	Sammarco	Adriana Lecouvreur	F-48	23
601		Tannhauser	F-49	22
625	Stracciari	Aida	F-51	31
626	"	Lucia di Lamm'r	F-50	31
650	Vignas	Lohengrin	F-53	40
651	"	Africana	F-52	40
675	Zenatello	Otelle	F-55	20
676	"	Traviata	F-54	20
677	"	Traviata	F-54	20
678	"	Manon Lescaut	F-56	21
700	Bonci and Magini-Coletti	Pescatori	F-57	35
701	" " and Burzio	Trovatore	F-21	36
725	"La Scala" Chorus	Favorita	F-58	47

I am in receipt of a letter dated January 4, 1909, from the European headquarters of my company, informing me that the Appeal Court in Germany has just rendered a decision condemning a record-copying firm under the German laws; specifically that the Kammergericht has rendered the decision in favor of the Gramophone Company against a firm engaged in copying or duplicating its records. My correspondent has promised to obtain and send to me a copy of said decision as soon as he can get the same.

Subscribed and sworn to before me,
this 18th day of January, 1909.

William E. Kelly
Notary Public,
New York County.

(SEAL).

MASSIE AFFIDAVIT FOR USE IN A SUIT ABOUT TO BE BROUGHT IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK BY FONOTIPIA LIMITED AND THE COLUMBIA PHONOGRAPH COMPANY (GENERAL) AGAINST WINANT V. P. BRADLEY.

IN THE CIRCUIT COURT OF THE UNITED STATES

For the Eastern District of New York.

FONOTIPIA LIMITED AND
THE COLUMBIA PHONOGRAPH
COMPANY (GENERAL)

vs. In Equity.

WINANT V. P. BRADLEY.

MASSIE AFFIDAVIT.

State of New York,
County of New York, SS.:

C. A. L. MASSIE, being duly sworn, deposes and says I am of counsel for complainants herein. For the past eleven years I have been one of the patent solicitors and patent counsel for the complainant COLUMBIA PHONOGRAPH COMPANY (GENERAL) and its allied concern the American Graphophone Company. I believe myself generally familiar with the processes, apparatuses, etc. employed in the talking-machine industry.

Modern disc sound-records are all made in accordance with the process described in U. S. Letters-Patent No. 688,739, granted Dec. 10, 1901, to Joseph W. Jones and another, and now owned by said American Graphophone Company. Said Jones Patent has been sustained by the United States Circuit Court of Appeals for this (the Second) Circuit, in two suits reported in 151 Federal

Reporter, 595. I should add that Judge HOUGH has recently held the Jones Patent anticipated; but we appealed promptly therefrom, and the appeal is to be argued early in February, 1909.

The following description will suffice to explain how disc sound-records are made:

There is a turn-table which carries a smooth disc of "wax-like" composition, upon which the original record is to be made. A diaphragm carrying the recording stylus is mounted above the revolving disc referred to, and there is a feed-screw or similar mechanism for gradually propelling the diaphragm and stylus across the face of the rotating tablet, so that the result of the gradual advance of the stylus and the rotation of the tablet would be to produce a shallow spiral groove in the surface of the recording-tablet. A horn or mouth-piece is mounted in front of the diaphragm, so that the singer or musician can play or sing into this horn and the sound-waves will be directed against the diaphragm. If no sound-waves should be uttered into the horn, the stylus would produce a true spiral groove in the tablet; but when a singer or instrumentalist sings or plays into the horn, the sound-waves vibrate the diaphragm and stylus; and the vibrations of the stylus cause the production of a "record-groove" which may be defined as a spiral groove having lateral undulations or sinuosities (or "zigzags") that correspond to the original sound-waves. The article so produced is known as an original "sound-record", or simply as an "original".

As the second step, the surface of this "original" is rendered electro-conductive (as by surfacing it with finely-powdered graphite or the like), and is submitted to an ordinary electroplating-bath, and a

copper electroplate is deposited thereon; when this metal electroplate has assumed sufficient thickness, it is separated from the "original" and its surface (that was next to said original) will present an exact counterpart or reverse of the original record-groove.

This electroplate reverse is known as a "matrix" or "shell" or "mother". It may be impressed into a disc of suitable thermo-plastic material, to make the commercial disc sound-records that are now so well known to the public. These latter are known as "duplicates", to distinguish them from the "originals". Generally, however, a second electroplate is deposited upon this first electroplate; and, when separated therefrom, the second electroplate will be the counterpart or reverse of the first electroplate. If we regard the "original" as a positive, then the first electroplate will be a negative, and this second electroplate will be a positive. And, thereafter, from this second electroplate is obtained in like manner a third electroplate. This third electroplate is commonly used as the "stamping matrix", it is a negative, and an exact counterpart of the "original".

From one original sound-record, made by one performance of the vocalist or instrumentalist, a plurality of stamping-matrices are obtained. And from each stamping-matrix are produced thousands and thousands of the impressed "duplicates" or commercial disc records put on the market for the public.

It will be seen that it is comparatively easy to obtain reverse electroplates from a disc sound-record, for use as stamping-matrices; so that it is a comparatively simple matter to make great numbers of counterfeit or

duplicate sound-records, at a trifling cost.

But it is not a simple, easy, or inexpensive matter, to produce high class sound-records in the first instance, even with the assistance of the necessary artists or musical talent. Although the general process is described in the Jones Patent above referred to, and elsewhere in literature, yet the precise construction and arrangement of the delicate instrumentalities made use of in making the original record, the precise composition of the "wax-like" material of the recording-tablet, etc., are all technical matters of the highest skill, and to a great extent are kept as trade secrets. Further, it requires great experience and the most delicate "knack" in properly adjusting the speed of the instrument, in properly locating the artists and their accompaniment etc. with relation to the horn of the instrument. Although there are probably thousands of people in this country and abroad who consider themselves more or less acquainted with talking-machine matters, yet the real experts in "taking" a sound-record are comparatively few.

I have received from Mr. P. D. Fernandes the four (4) so-called "Continental" records referred to in his affidavit of even date herewith, and I will produce in Court the Bonci, Zenatello and Barrientos records identified by him.

C. A. L. Massie

Subscribed and sworn to before me,
this 30th day of January, 1909.

Ralph L. Scott,
Notary Public,
New York County.

(SEAL).

IN THE CIRCUIT COURT OF THE UNITED STATES
For the Eastern District of New York.

FONOTIPIA LIMITED AND THE
COLUMBIA PHONOGRAPH COMPANY
(GENERAL)

vs. In Equity.

WINANT V. P. BRADLEY.

CARRENO AFFIDAVIT.

State of New York,

City and County of New York, SS.:

MANUEL ANTONIO CARRENO, being duly sworn, deposes and says, I am of lawful age and reside in the City of New York. I read, speak and understand both the Italian and the English languages thoroughly. I am by profession and occupation a translator of English and Italian. I have had a musical training and am familiar with a great many Grand Operas, among others La Traviata by Verdi.

In the afternoon of February 3, 1909, in company with complainants' counsel, Mr. Massie, in the offices of the Columbia Phonograph Company (General) at 154 Nassau Street, Borough of Manhattan, New York City, I listened to repeated reproductions from two sound-record discs, which I identify as follows:

One of these discs bears a label headed "The Continental Record Co. New York, U.S.A." At the close of

the audicle reproduction referred to I scratched upon the smooth portion of this disc, between the label and the record-groove thereof, the following: "Same as 39664". The label on this record names it as "La Traviata (Verdi) - Aria di Alfredo (De'miei bollenti spiriti)" purporting to be executed by Giovanni Zenatello, tenor, and bearing the number 676. On the reverse of said disc appear scratched thefollowing: "P.F. - 1/29/09". I shall refer to the musical selection on this record as the"Continental Record" and the label as "Continental Label".

The other record-disc was a double-faced record, having on each face a sound-record and the Columbia-Fonotipia label. One of these labels states that the selection is "La Traviata (Verdi) - Scena della borsa - Questa donna conoscete?" by Giovanni Zenatello, giving the number 39664. I have scratched upon this face of said disc, in the smooth surface between the label and the record-grooves thereof, "Same as 676". Upon the said label (and likewise upon the label on the other side of said disc) is stamped "F 54". I shall refer to the foregoing label as "Columbia Label, Borsa, No. 39664", and the musical selection thereon as "Columbia Borsa Record".

Upon the other side of said double-faced record-disc is a similar Columbia-Fonotipia label giving the title "La Traviata (Verdi) - Aria di Alfredo - De miei bollenti spiriti" by Giovanni Zenatello, and giving the number 39663. (This label had stamped upon it, as already noted, the same "F 54" as on the reverse label of the same disc). I shall refer to the label just described as "Columbia Label, Alfredo, No. 39663", and to the musical selection thereon as "Columbia Alfredo Record".

I listened repeatedly to reproductions of said double-faced record, and recognized the two musical selections thereon. The "Columbia Borsa Record" is properly identified by the "Columbia Label, Borsa, No. 39664"; and the "Columbia Alfredo Record" is properly identified by the "Columbia Label, Alfredo, No. 39663". In short, the labels on said double-faced record are properly applied. I note that the record-grooves of the Columbia Borsa (No. 39664) do not extend so far inward towards the center of the disc as do the record-grooves of the Columbia Alfredo (No. 39663).

The "Continental Record" referred to is incorrectly labeled. The musical selection itself is "Scena della borsa - Questa donna conoscete?". In short, the Continental sound-record itself is the same selection as the "Columbia Borsa Record" (No. 39664); whereas the "Continental Label" calls for the same selection as the "Columbia Label, Alfredo, No. 39663" (upon the reverse of the same Columbia disc).

I carefully compared the musical selection rendered by said Continental Record (No. 676) with the musical selection rendered by said "Columbia Borsa Record" (No. 39664), - having the two played for me over and over, a number of times. The renditions of these two sound-records are identical; and in my opinion each is a duplicate obtained (either directly or indirectly) from the same original execution of the song by the artist.

M. A. Farrell

Subscribed and sworn to before me,
this 4th day of February, 1909.

Ralph L. Seaver
Notary Public,

(Seal) New York County.

IN THE CIRCUIT COURT OF THE UNITED STATES

For the Eastern District of New York.

FONOTIPIA LIMITED and
COLUMBIA PHONOGRAPH COMPANY
(GENERAL)

vs. In Equity.

WINANT V. P. BRADLEY.

ANDERSON AND CROMELIN AFFIDAVIT.

State of New York,)
: ss:
County of New York,)

AND. ANDERSON and PAUL H. CROMELIN, being severally and jointly sworn, depose as follows: The said Cromelin deposes that he has already made an affidavit herein; and the said Anderson deposes that he is Assistant Secretary of the American Graphophone Company, and has been connected with that concern for the past five years. And the two affiants severally and jointly depose as follows:

In the afternoon of Tuesday, February 2, 1909, in the office of the said Cromelin, at No. 154 Nassau Street, in New York City, and in the presence of complainants' counsel, C. A. L. Massie, Esq., we reproduced upon a talking machine three disc sound-records purporting to be put out by the "Continental Record Company, New York, U.S.A."; and in comparison with each of said records we reproduced upon the same talking machine a disc record of the same musical selection put out by the Columbia Phonograph Company (General). In our opinions, after listening carefully to the reproductions of said records, one immediately after the other, we believe, and therefore aver, that each of the

record were obtained from the same specially executed selection made by the singer whose name appears thereon.

The records were played as follows:

First, the so-called Continental record, which had scratched on the reverse thereof the initials and date "P. F. - 1/29/09", and which bore on its label the title: "La Traviata (Verdi) - Aria di Alfredo (De'miei bollenti spiriti) This record is a duplicate of an original record made by Giovanni Zenatello, Tenor 676". And immediately thereafter we undertook to play the corresponding Columbia Fonotipia Record of the same selection specially executed by the same artist. This Columbia article is a double-faced record, containing on one side a label naming the particular musical selection just quoted ("Aria de Alfredo"), and on its other side another selection from the same Opera, specially executed by the same artist. This second label names the selection as follows: "La Traviata (Verdi) - Scena della borsa -- Questa Donna Conoscete?" Upon playing them, we found that the Continental "Aria de Alfredo" record was the same as the specially executed Columbia Fonotipia record labelled "Scena della borsa" etc. by Zenatello; and said Continental record played an entirely different selection from the one played by the said Columbia Fonotipia "Aria de Alfredo" (on the reverse of the "Scena della borsa").

Next, we played the Continental record, which likewise had scratched on the reverse thereof the initials and date "P. F. - 1/29/09"; and whose label bore the following: "Manon Lescaut (Puccini) - Romanza di Des Grieux (Donna non vidi mai) This record is a duplicate of an original record made by Alessandro Bonci, Tenor 356". And immediately thereafter we played the corresponding Columbia Fonotipia

Record of the same selection specially executed by the same artist.

And, finally, we played the Continental record, having scratched on its reverse the same initials and date ("P. F. - 1/29/09"), which bore the following title on its label: "La Sonnambula (Bellini) - Cavatina di Amnia Parte I, Aria (Come per me sereno) This record is a duplicate of an original record made by Maria Barrientos, Soprano 302". And immediately thereafter we played the corresponding Columbia Fonotipia Record of the same selection specially executed by the same artist.

The two specimens of each selection were played and listened to by us several times for each comparison. And, for the reasons stated, we believe, and therefore aver, that the so-called Continental record and the corresponding Columbia Fonotipia Record were obtained from the same specially executed original record.

Jointly and severally subscribed and sworn to, before me, this 4th day of February, 1909.

Ralph L. Scott,
Notary Public,

(SEAL) New York County.

IN THE CIRCUIT COURT OF THE UNITED STATES

For the Eastern District of New York.

FONOTIPIA LIMITED, and THE
COLUMBIA PHONOGRAPH COMPANY,
GENERAL,

vs. In Equity.

WINANT V. P. BRADLEY.

FORBUSH AFFIDAVIT.

State of New York,)
: ss:
City and County of New York,)

G. A. FORBUSH, being duly sworn, deposes and says: I am of lawful age and am employed in the New York laboratory of the Columbia Phonograph Company (General), one of the complainants herein, now located at 102 W. 38th Street, New York City. I have been connected with said Company for the past dozen years. After the first year or two, I have been employed from time to time at the Factory of the American Graphophone Company, in Bridgeport, Conn., in connection with the making of disc sound-records. The American Graphophone Co. is the manufacturing concern for said Columbia Phonograph Company (General). I have spent altogether about four years in said Factory. The balance of the time, amounting to about eight years, I have been employed in the New York Laboratory of said Columbia Co. I consider myself familiar in a practical way with the details of the manufacture of disc sound-records, since that has formed a large part of my daily work for many years.

Complainant's counsel Mr. Massie has shown me six disc records which he tells me are exhibits in this suit. Three of them I recognize as "Columbia Records, Fonotipia Series", and the other three are labelled as "Continental Records". I identify the same in pairs, as follows: Columbia No. 62,131 and Continental No. 356; Columbia No. 39,457 and Continental No. 302; and Columbia No. 39,664 and Continental No. 676. I note that of this last pair the Continental label corresponds with the label on the reverse of its companion Columbia record.

I have made a comparative examination of the respective pairs above set forth, with the aid of a magnifying glass, and have noticed a number of resemblances, some of which are stated below. On each Columbia record its stamped laboratory-number appears in the smooth band between the label and the series of record-grooves. For convenience I shall consider this laboratory-number as at the top or north of the disc, and refer to it as "12 o'clock" in order to indicate conveniently the angular position of the various points hereinafter referred to, by reference to the figures on a clock-dial. Among other similarities between the members of the respective pairs, I have observed the following, viz:

Columbia No. 62131, and Continental No. 356.

1. On the Continental record, at a location corresponding to the laboratory number of the Columbia record (radially outward beyond the last part of the word "RECORD" on the Continental label), appears a slight swelling, which in my opinion indicates that an electroplate matrix had been obtained from an identical specimen of said Columbia

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No. 62131; that said Laboratory number which appeared in relief on said matrix, had been obliterated, the erasure resulting in a slight gouging out or depression in the face of the matrix; so that the Continental record impressed by said matrix presents the slight swelling aforesaid, which is plainly noticeable to the eye. I have rubbed a soft pencil over this portion of the Continental record to make it more apparent. By rocking said record slightly from side to side and to and fro, while placing the eye at an angle to the light, there can be observed the first three figures of the laboratory number of said Columbia record No. 62131, viz: a "6", a "2" and a "1". The "6" is perhaps not quite so plain as the "2" and the "1". This portion of the Continental record will be referred to as its "12 o'clock".

2. The record-groove, on both the Continental and on the Columbia, begins a little after (to the right of) "12 o'clock", on the outer portion of the disc. There are apparent two "false starts" - where the recording-stylus, employed in making the original record, had been lowered slightly into the "wax", and then raised again. The real start is about "11 o'clock" on each disc. The record-groove on all these discs runs "counter-clockwise".

3. The record-groove on each disc ends a short distance past "3 o'clock", on the inner side of the series of grooves.

4. At about "6 o'clock" on each record, and just outside of the outer record-groove, appears a short groove (apparently the reproduction of a gouge made by a shaving-knife), about a half inch long, parallel to the record-

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groove, and distant from the outer groove about the space of two grooves. This (curved) groove is wider than the record-groove, and, as stated, seems to be due to the "shaving-knife", which is employed in shaving off or "trueing" the surface of the "wax" disc just before the original record is made thereon.

5. At about "5 o'clock", on each record, in the narrow smooth space outside of the record-grooves, and inside of the ornamental bead, appears a small circular swelling or bump or blister.

6. On each record, at not quite "3 o'clock", on the smooth portion beyond the record-grooves, appears a small pimple or blemish, elongated radially of the disc.

7. Near the aforesaid, a short distance further down towards "4 o'clock", and upon the top of the seventh and eighth ridges (counting inwardly towards the center of the disc), appear parts of another small pimple or blemish which pimple extends somewhat diagonally of the radius.

8. At about "2o'clock" on each record, on top of the second and third ridge (counting inwardly from the periphery), appears a slight swelling or pimple that is intersected by the groove.

9. Shortly after "12" on each record, on top of the same ridge in each case (about the 40th from the outside), appears a small raised spot or pimple.

10. At about 7:30 on each ridge I have marked a circle and short line near the inner portion of the record-grooves. Within said circle appears on each record a slight blemish or pimple on top of a ridge; and, beyond the next

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two ridges (towards the center), there appears a very unique and pronouncedly-undulating record-groove.

11. Radially outward from the last-mentioned feature I have placed a small pencilled circle on each record. Within this circle is found on each record an elongated bump or swell on top of a ridge. Beyond the next two ridges (counting radially outward), appears a unique record-groove having long and boldly-sweeping curves; then, still further outwardly, beyond three more ridges, there appears another unique record-groove having shorter yet boldly-curving undulations.

It is impossible to conceive that the two records could accidentally contain ALL of the blemishes above pointed out. It would be impossible for a singer to sing the same song twice and present precisely the same features in the record. And it would be impossible for duplicates obtained from two different original recordings of the same selection (even though made by the same singer) to present all of these resemblances.

In my opinion, and especially in view of the first point above set forth (with regard to the laboratory number), I believe that the Continental Record No. 356 has been pressed from an electroplate matrix obtained directly from an identical specimen of the Columbia Record No. 62131.

Columbia No. 39,457 and Continental No. 302.

1. The laboratory-number of the Columbia being regarded as "12 o'clock", as before, I find on the corresponding portion of the Continental No. 302 radially outward

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beyond the word "THE" of its label, a slight swelling, and an incidental blemish on the adjacent record-grooves, indicating that the reverse laboratory-number of an electroplate matrix obtained directly from an identical specimen of Columbia No. 39,457 had been obliterated. There is reproduced on the Continental record the scorings where the metal of the matrix had been rubbed and burnished, - resulting as indicated in marring the adjacent portion of the record-grooves.

2. The record-groove in each record begins at the outer portion thereof, about "6:30 o'clock".

3. The record-groove in the Columbia ends just above the figure "9" of its laboratory number. In the Continental, this portion of the record-groove is obliterated; but before the obliterated portion is reached, the inner record-groove is plain, and later on it has disappeared.

4. Around the outer portion of each record for about a quarter of an inch, the record-grooves present a slightly darker appearance than the remainder of the record-grooves.

5. At about "10:30" on each record I have placed a pencilled circle. Extending through this circle (and a considerable distance on each side thereof) is a dark curving line (caused by the way the record-grooves reflect the light). Within this circle, on each record, is an elongated patch of brighter color or "high light".

6. At about "4" on each record, counting inward (radially) across the two outermost grooves, is seen a flattened ridge, as though a short portion of its top had been cut away. This is the second distinct ridge from the outside. This flattened portion is about a quarter-inch long.

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7. Between about "5:30" and "7" I find, on each of these two records, the same six blemishes - slight blisters or bumps having the same relative position on each record.

8. On each disc, a short distance before "6 o'clock", upon the smooth surface between the outermost record-groove and the ornamental bead, is seen a "dimple".

9. Upon the Columbia record, and just above the last figure "1" of its laboratory-number, are seen two blemishes, one being located on top of the fourth distinct ridge above said smooth portion; and the other being located upon the fifth distinct ridge, and a little to the right. The Continental record shows the same two blemishes, similarly located, shortly to the right of its "12 o'clock".

I am of the same view as to the common origin of these two records as above stated with regard to the other pair. It is impossible for a singer executing on a second occasion the same musical selection, to produce precisely the same original sound-record. And it is impossible for matrices and pressed records obtained from one such execution, to present the same blemishes found in records and matrices obtained from another execution of the same selection (even by the same singer). In my opinion, and for the reasons stated, the Continental record No. 302 has been impressed from a matrix obtained from an identical specimen of the Columbia Record No. 39,457.

Columbia Record No. 39,664 and Continental Record Labelled 676.

1. On the Continental record, radially outward

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beyond its No. 676, appears the slight swelling that indicates (for the reasons stated) the obliteration from defendant's matrix of complainant's "laboratory-number" in relief. This is the "12 o'clock" of this Continental No. 676.

2. The record-groove on each disc starts at the outer side between "11" and "12", evolving almost imperceptibly from the reproduction of a "shaving-mark" (made by the "shaving-knife" already explained). There is near the beginning of this record-groove a blemish or blister; and then, about an inch to the left, said record-groove assumes its proper depth.

3. On each disc, the record-groove finishes at about "9:30", on the inner side.

4. At a little before "6", over or upon the lowermost series of record-grooves of the Columbia, appear two "dimples", which can be observed by holding the disc at an angle to the light and tilting it back and forth; and upon the plane surface exterior to the record-groove, and adjacent the outermost of said dimples, appears a short (curved) groove, as though a reproduction of a groove gouged out by the recording-stylus. Upon the corresponding location of the Continental No. 676, appear crisscross scratches or scoring-marks; whereas, on either side thereof, this plane surface shows only the parallel markings of the shaving-knife. This scoring indicates the erasure, from the metallic Continental matrix, of the relief reproduction of the groove last-mentioned. The erasure upon this portion of defendant's record-matrix would result in a hollowing out, and that would cause the corresponding swelling that appears upon the Continental record. This erasure almost

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obliterates the outermost of the two "dimples" referred to and the short outside groove; but the inner dimple is still plainly visible upon tilting the said Continental record back and forth.

5. At "2", outside of the record-grooves on each of the two discs, appears a gouge, as though due to the recording-stylus. It is the normal distance from the outermost record-groove, and is about three-quarters of an inch long.

6. At a little after "1", on each disc, I have pencilled a small circle, within which are two blemishes, or pimples. One of these is divided by a record-groove, and appears upon the top of the two adjacent ridges; the second ridge radially inward therefrom has the other pimple upon its top, a little to the left of the first-named one.

7. At "8" on each disc I have placed a pencilled circle and a short line. Within this circle is a pimple or blister upon the top of the ridge. The third groove radially inward therefrom has a markedly-undulatory groove of short curves.

8. Radially outward from the foregoing, and midway between the beading and the outer edge of each disc, is reproduced the same blemish or pimple.

The presence in these two records of all of the foregoing blemishes, for the reasons already stated, convinces me that this Continental Record No. 676 was impressed from a matrix obtained from an identical specimen of the Columbia Record No. 39,664.

G. A. Forbush.

Subscribed and sworn to before
me this 16th day of February, 1909.

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(SEAL) Ralph L. Scott
Notary Public, New York County.

IN THE CIRCUIT COURT OF THE UNITED STATES
For the Eastern District of New York.

FONOTIPIA LIMITED AND THE
COLUMBIA PHONOGRAPH COMPANY
(GENERAL)

vs. In Equity.

WINANT V. P. BRADLEY.

EMERSON AFFIDAVIT.

State of New York,)
: SS.:
City and County of New York,)

VICTOR H. EMERSON, being duly sworn, deposes and says: I am in charge of the Record-Making Department of The Columbia Phonograph Company (General) in New York City. For over fifteen years I have been engaged in the talking-machine business as an expert record-maker. I believe myself thoroughly familiar with the art and practice of making disc sound-records. I have made it my business to keep posted in all the developments of this industry and to study all the questions relating thereto.

I have read the affidavit of Mr. G. A. Forbush, herein, and have examined the six disc records referred to by him. I agree with Mr. Forbush's statements as to the presence of the same blemishes in each pair of records, and I agree with Mr. Forbush's conclusions as to how the Continental records were made.

I have in the Columbia laboratory electroplated ordinary commercial disc sound-records (similar to the six referred to), obtaining thereby metallic reverses,

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which I have employed as stamping-matrixes; and have from said matrixes produced stamped duplicates. A comparative test between such duplicates and the regular commercial duplicates of the same selection, shows to an expert that the audible reproduction (the music) obtained from the former is precisely like that from the latter, - with the exception that the former has a more scratchy surface, and the quality of its audible reproduction is not so pleasing to the ear. I have made a similar audible comparison between the records of the respective pairs of records named by Mr. Forbush, with a like result, viz: that the Continental records are more scratchy and less pleasing to the ear than the corresponding Columbia records, but in other respects the execution is identical for each pair. It is impossible for the singer to make a second time a "sound-record" precisely identical with an earlier execution by him of the same selection.

In playing Columbia No. 62,131, and Continental No. 356, I observe that the piano accompaniment begins upon the fourth revolution of each record; and that in the third revolution in each, before the piano starts, there is heard a foreign noise.

In playing the Columbia No. 39,457 and Continental No. 302, I observe that the piano accompaniment begins upon the seventh revolution of each disc.

In playing Columbia No. 39,664 and Continental No. 676, I observe that the piano accompaniment begins on the third revolution.

On account of the facts observed by me and stated in the Forbush affidavit, and for the reasons stated therein, and for the further reason of the location of the

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beginning of the piano accompaniment just set forth, I unhesitatingly state my expert opinion that each Continental aforesaid and the corresponding Columbia record were obtained from the same original execution by the singer; and that each Continental record is a duplicate obtained from an identical specimen of the corresponding commercial Columbia disc record.

Victor Kammerer

Subscribed and sworn to before me,
this 16th day of February, 1909.

Ralph L. Scott

NOTARY PUBLIC, No.
NEW YORK COUNTY.

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IN THE CIRCUIT COURT OF THE UNITED STATES
For the Eastern District of New York.

FONOTIPIA LIMITED AND THE
COLUMBIA PHONOGRAPH COMPANY
(GENERAL)

vs. In Equity.

WINANT V. P. BRADLEY.

SECOND MASSIE AFFIDAVIT.

STATE OF NEW YORK,
County of New York, SS.:

C. A. L. MASSIE, being duly sworn, deposes and says: I am of counsel for complainants and have already made an affidavit herein.

On Feb. 17, 1909, I received a letter from Horace Pettit, Esq., of Philadelphia, dated the 16th inst., advising me that he was forwarding to me, by the United States Express, eight (8) Continental Records purchased by The Edisonia Company of Newark from Winant V. P. Bradley and delivered to said Pettit's office by the President of said Edisonia Company (Mr. A. O. Petit), and that upon the back of each of said records was scratched Mr. A. O. Petit's name and a date. A short time later, on the same forenoon, I received a sealed package from the United States Express Co. which contained the eight (8) Continental Records (similar in label and appearance to the three already made exhibits herein), and I observe that on the back of each is scratched Mr. A. O. Petit's name and a date. I understand that affidavits will be presented by Mr. Horace Pettit's office, in the companion suit against this defendant by the Victor Talking

Machine Co., setting forth the purchase of said Continental Records from the defendant herein, and tracing them to myself.

I have, with the naked eye, made certain comparisons, in describing which I shall use the same clock-dial nomenclature employed in the Forbush affidavit herein. These eight Continental Records bear labels corresponding with the designations found in defendant's catalogue annexed to our Bill of Complaint. I shall refer to the same merely by catalogue numbers on their labels.

Continental 526 and Columbia 39212.

The former shows, upon the position corresponding to the laboratory number on the latter, a swelling, indicating the erasure from defendant's matrix of complainants' laboratory number appearing in relief on said matrix. The swelling referred to is located diametrically opposite the last portion of the word "RECORD" on the Continental label. By tilting the Continental Record the remains of complainants' laboratory number can be recognized, viz: 39212. The record-groove of each of these two records begins gradually between "8" and "7", and ends on the inner side of the annular zone of grooves, about "4.30 o'clock". The facsimile signature of the singer "Regina Racini" has been impressed into the Columbia record; and on the corresponding portion of the Continental appear reproductions of scorings for erasing the same from defendant's matrix. Within an inch or so on either side of "6 o'clock" on each disc, the same three pimples are observed within the smooth zone outside of the record-zone. About "A o'clock" within the same smooth zone, the same pimple appears on each disc. In the same

smooth zone, and about "8 o'clock", appears a reproduction of a distinct gouge, as if cut by the shaving-knife, about a quarter inch long.

Continental 475 and Columbia 39203.

Upon the position corresponding to the Columbia laboratory number, the Continental Record presents the swelling or blemish which I regard as its "12 o'clock". This is found within the red margin of the label, just to the right of the "CO." Each record has, within the normal zone of record-grooves, a smooth band or annulus, followed by some seventeen convolutions. The groove of these convolutions begins at "12 o'clock", and the same ends at about "12.30 o'clock". I have had these two inner record-zones played in succession for me upon the same talking-machine; and each gives forth the same long-sustained and shrill note. The main record-groove of each record begins at the bottom of the disc, about "6 o'clock", and ends at a little past "3 o'clock" at the same smooth zone referred to. At about "2 o'clock", in the outer smooth band, is a reproduction of a short and clearly defined gouge (as if made by the shaving-knife) located adjacent to the outer record-groove.

Continental 427 and Columbia 39490.

Radially outward from the word "RECORD" on the Continental disc appears the swelling indicating the erasure of complainants' laboratory number. On tilting the Continental disc as before, the remains of figures can be made out on said swelling, which seem to be those of complainants' laboratory number "39490", but I cannot be sure that I recognize all of them positively. The record-groove

begins [illegible] about"11 o'clock". At about a little past "9 o'[illegible] the outer smooth band, the same blemish is found in each; this appears like a large comma followed by a smaller period.

Continental 701 and Columbia 39439.

Corresponding to complainants' laboratory number and "12 o'clock", the Continental Record shows traces as of erasure of the former, and the raised numbering "42", - which would indicate that a numbering-punch (containing the numbers in reverse) had been forced into defendant's stamping matrix. The record-groove in each case begins about "10 o'clock", and ends about "8 o'clock". And at about "6.30" in each, there appears, just outside of the record-grooves, the reproduction of a short and clearly defined gouge as though made by the shaving-knife. At not quite "5 o'clock" on each disc, in the same outer smooth zone, inside of the ornamental bead, appears an irregular wavy blemish, suggesting a profile of a mountain whose crest rises abruptly and extends over one or two record-grooves. This blemish appears to be about an inch in extent.

Continental 357 and Columbia 39697.

At the location corresponding to the Columbia laboratory number and "12 o'clock", appears a rather irregular swelling on the Continental disc, at the left of which the number "36" appears in relief. This swelling I shall regard as the Continental "12 o'clock". On tilting the Continental disc as before, my eye observes certain

equidistant irregularities of light, which suggest complainants' laboratory number, although I cannot with my naked eye recognize the figures. On each disc the record-groove begins very gradually about "9", and ends just above the left of "12 o'clock". At about "6 o'clock" on each disc, upon the smooth band outside of the record-grooves, appears the reproduction of a distinct gouge made as by the shaving-knife, something less than a half inch long, with a little nick to its right. At about "8.30" on each disc I have marked two parallel lines, between which I observe the same series of blemishes, bearing the same relative positions.

Continental 350 and Columbia 39695.

This Columbia record does not present its laboratory number in the usual place; it has instead the symbol: "X Ph 1985", and the laboratory number is below this, - appearing through the Columbia label. The corresponding portion of the Continental Record has been countersunk with the label, so that it does not present the swelling hitherto referred to as indicating "12 o'clock". But, for reasons that will appear below, it seems proper to regard the "A" forming the initial of the singer's name (Alessandro Bonci) as indicating "12 o'clock". I observe that the record-groove on each disc begins at the top of the disc (radially above "12 o'clock"); and that the same ends in the Columbia just above the "5" of the impressed symbols "X Ph 1985", and that it ends at a similar position upon the Continental Record. And, radially inward from the point last-mentioned, and corresponding to the tail of the figure "5" of the Columbia record, there plainly appears on the Continental the reproduction of the said tail. In the smooth portion, just below "6 o'clock" on each disc,

appears the reproduction of a distinctly marked gouge as if made by the shaving-knife.

Continental 675 and Columbia 39973.

The Columbia record appears to have been incorrectly numbered at first, because in addition to the number 39973 etc. it shows another number having lines of cancellation therethrough. Above the last portion of the word "CONTINENTAL" and above the word "RECORD", on the Continental disc, appear irregular swellings indicating the removal of both complainants' laboratory numbers (as before), the swellings on the Continental disc extending so as to correspond with the position of both the cancelled number and the correct number of the Columbia disc. The record-groove on each disc seems to begin very gradually about "9 o'clock" (assuming the correct laboratory number on the Columbia as "12 o'clock"), and is very faint for a long distance. I have had to use a strong magnifying glass to locate this. On each disc the groove ends at about "10.30". At a little past "3", on each disc, the next to the outermost groove is abnormally enlarged for a slight distance. I have played the first half of these two records, one after the other on the same talking-machine, and note that the audible reproductions are the same.

The eighth Continental Record is numbered 725, and I have not yet had an opportunity to compare this with the corresponding Columbia record.

I have read the Forbush and Emerson affidavits herein, and believe I understand the same. I likewise verified for myself the resemblances pointed out by Mr.

Forbush. The fact that each Continental Record when compared with the corresponding Columbia record presented the same blemishes found in the latter, indicates, and to me it indicates conclusively, that the Continental Records were obtained from the Columbia records.

Cal. Massie.

Subscribed and sworn to before me,
this 18th day of February, 1909.

Ralph L. Scott
Notary Public,
New York County.

(Seal).

5-92

e take notice that.....

.....

he within is a true copy, was duly filed and entered
e of the Clerk of the United States Circuit Court
.....District of.....on
.....day of....., 190..

Yours, etc.,

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e take notice that.....

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the within is a true copy, will be presented for
.....to.....
.....
.....day of....., 190..,
..o'clock.....M., or so soon thereafter as counsel
ird.

.....

Yours, etc.,

.....

.....

Sworn to before me this
day of , 190

Notary Public.

IN THE CIRCUIT COURT OF THE UNITED STATES

For the Eastern District of New York.

FONOTIPIA LIMITED and THE COLUMBIA PHONOGRAPH COMPANY (GENERAL).

vs.

WINANT V. P. BRADLEY.

In Equity, Docket No......

On.....**Patent No.**.....

MEMORANDUM FOR COMPLAINANTS ON MOTION FOR PRELIMINARY INJUNCTION.

PHILIP MAURO,
C. A. L. MASSIE,
Of Counsel for Complainants.
Tribune Building, 154 Nassau Street, New York City.

RALPH L. SCOTT, *Esq.*,
Solicitor for Complainants,
154 Nassau St., New York City.

Due and timely service of a copy of the within

.....is hereby admitted

this.....day of.....190..

.....

.....

C. G. Burgoyne, Walker and Centre Streets, New York.

INDEX OF COMPLAINANTS' BRIEF ON MOTION FOR INJUNCTION.

IN THE CIRCUIT COURT OF THE UNITED STATES
For the Eastern District of New York.

FONOTIPIA LIMITED AND
THE COLUMBIA PHONOGRAPH COMPANY
(GENERAL)

vs. In Equity.

WINANT V. P. BRADLEY.

MEMORANDUM FOR COMPLAINANTS ON MOTION FOR PRELIMINARY INJUNCTION.

BRIEF STATEMENT OF FACTS.

This is a case of UNFAIR COMPETITION. The subject-matter relates to disc sound-records for talking-machines. The subject-matter itself is the BUSINESS of producing and selling high-grade Grand Opera sound-records. Complainants at great expense and by extraordinary efforts have built up a large business that consists of producing and putting on the market disc records of Grand Opera selections especially sung for them by various foreign Grand Opera stars of international renown. The artists referred to are under exclusive contract not to sing for any other talking-machine concern or person whatever.

The Bill of Complaint explains briefly (in paragraph II), and the Massie affidavit (on pp. 2 and 3) sets forth more fully, how these sound-records are made. From one act of singing (or "recording") is produced one single "original" sound-record; and from that specially executed original sound-record are ultimately produced copies or "duplicates" by the tens of thousands. Complainants, in order to obtain the exclusive services of these world-famous artists have to pay them a substantial royalty on each and

every "duplicate" copied from an "original" executed by the singer.

To obtain these high-grade sound-records, it is likewise necessary to have the services of an expert who supervises the making of the original record by the singer. Moreover this "recording" requires special and delicate apparatuses and appliances, that have been developed and improved as the outcome of long years of experiment and practice.

In building up our business, there are four important factors involved, viz: (1) the special apparatuses etc. developed by us; (2) the skill of our experts; (3) the great ability and reputation of the artists; and (4) the enterprise and advertisements etc. of complainants. And the result is an enormous business in making and placing in the hands of the American public Grand Opera records of super-excellent quality, - thus contributing to the entertainment and musical education of our country. Enormous sums of money have been spent and are still being spent by complainants in advertising and building up this business; and, as noted, enormous sums are still being paid to the artists for each and every duplicate sound-record put out by complainants.

All this constitutes a legitimate business. It is a very profitable business, and complainants are carrying it on as a "going business", and are able and willing to supply the large public demand which they themselves have created and maintained.

Defendant is now making duplicates or copies of these specially executed musical selections, recorded for us by the Grand Opera stars who are under exclusive contract with us; and recorded in our laboratories, under the supervision of our experts, and by means of our special appliances etc. And defendant is offering his counterfeits for sale at 60 cents each, whereas complainants' list price, for their double-faced records is $2.50 each. (See Bill, paragraph IX, X; Cromelin affidavit, paragraph III on pp. 3-5).

The Bill of Complaint shows briefly (paragraph IX), and the Massie affidavit more fully (pp. 3 and 4), that defendant will be able to do this at a trifling expense.

Complainants have created this particular market, they have at great expense placed at the disposal of the American public the gems of music executed by such artists as Signor Bonci and Madame Russ; they have to bear the burden of maintaining laboratories and experts for producing the "original" records, and the constant "overhead expense" of paying royalties to the artists. Defendant is obtaining the benefit of all this, without it costing him one penny. This is not fair. Defendant is undertaking to reap the harvest we have sown.

Defendant, not having to equip and maintain a recording laboratory, and not having to pay any royalty or other compensation to the artists, can well afford to sell his counterfeit records at a mere fraction of our list price, and yet make money.

But the profits that defendant thus makes will be insignificant as compared with the enormous damage

thereby caused complainants. It cannot be expected that a purchaser would pay complainants their price if he can get practically the same article from defendant for one-quarter or one-half the price. And the fact that defendant is making such offers, by distributing circulars and catalogues to the trade, will of itself tend to unsettle the market, to the irreparable injury of complainants' business in the making and placing on the market of these high class records.

Moreover, subsequent to the execution of our Bill, but prior to its filing, we have obtained evidence that defendant has actually put out some of his counterfeit records (see paragraph XII of our Bill). We produce three specimens of counterfeit records put out by defendant. (See Fernandes affidavit, and last paragraph of Massie affidavit). And subsequent to the first hearing herein we have received eight more (see second Massie affidavit).

If defendant be permitted to continue his counterfeiting and his offers of counterfeit records, then others will be encouraged, and other counterfeitors may be expected. And complainants, being at far greater expense in carrying on the legitimate business of obtaining and putting out the genuine records, will be forced by such unfair competition either to give up this branch of business entirely - to their own great loss, and to the corresponding injury of the artists, and to the great deprivation of the public (who would then be able to receive no more of the specially executed Grand Opera records), - or, we will have to be content with receiving only a spender profit (or carry on our business with no profit at all), while the counterfeiters are growing rich in thus unfairly exploiting the business which our efforts and expense have created. We are the creators of the business; defendant is the parasite preying on our business and destroying it.

PROOFS AGAINST DEFENDANT.

The Fernandes affidavit shows that the defendant is distributing the circulars and catalogues of which a specimen is annexed to our bill. This action alone is itself injuring us; since by it defendant is offering to the public, at 60¢ each, "Continental Records" containing what purport to be the same selections that complainants list (in their double-faced records) at $2.50 each.

We have obtained from defendant and produce in Court eleven of these Continental Records. Three were obtained from Mr. Fernandes, and the other eight through the Edisonia Co. and a Mr. Petit (not the counsel for the Victor Company).

The evidence shows that these Continental Records are in fact counterfeits obtained from complainants' own records. We mean, that defendant's Continental Records are copied from the commercial disc records put out by complainants. The legal effect of this course of piracy by defendant will be considered later; but for the present we will set forth briefly the nature of the proofs.

And, first, the Fernandes affidavit shows that the defendant Bradley called upon Fernandes to solicit orders for defendant's Continental Records at 60¢ each; that defendant gave Fernandes the circular and the catalogue annexed to our bill; that from said catalogue Fernandes ordered from the defendant four records; that about twenty days later he received the four records so ordered with another copy of the catalogue aforesaid; and that he delivered the said records to complainants' counsel.

These records bear the heading "The Continental Record Co. New York, U.S.A.", which appears upon the exhibit circular referred to; and they bear the same titles, respectively, including the catalogue numbers, that are found in the said exhibit catalogue, and they purport to be executed by the same artists.

The second Massie affidavit (and the affidavits in the Victor suit argued herewith) show that the other eight Continental Records were purchased from the defendant Bradley by the Edisonia Co. (of Newark), who delivered them to the office of Horace Pettit, Esq. (of counsel for the Victor Co.); and that he sent them to complainants' counsel.

These eight Continental Records likewise correspond, in the respects above pointed out, with the records listed in the exhibit catalogue.

The said catalogue has reading matter on its outside page, after which the remaining seven pages contain a list of seventy-four (74) titles of Grand Opera selections executed by the various Grand Opera Singers named in said catalogue. After the first page and a half, every record listed in said catalogue is shown by the Cromelin affidavit to correspond to the same selection, made for us by the same artist (under exclusive contract), and listed in our catalogue. A wholesale piracy!

IDENTITIES BETWEEN CONTINENTAL RECORDS AND CORRESPONDING COLUMBIA-FONOTIPIA RECORDS.

The Anderson & Cromelin affidavit and the Emerson affidavit show, as to the first three Continental Records - and the Carreno affidavit as to one of the same three - that

said records have been compared with complainants' corresponding genuine records, by playing the same upon talking-machines; and that in each case defendant's Continental Record and complainants' corresponding Columbia Record are from the same original rendition of the particular selection specially executed by the particular artist in each case.

The affidavits of Carreno, Forbush, and Emerson show another significant fact, viz: that defendant's Continental Record that is labelled "Aria di Alfredo etc.", No. 676 (listed on the last page of defendant's catalogue) - the "Air of Alfred" ("Alfred Song") - is not the "Alfred Song"; but is the "Scena della Borsa" ("Scene of the Purse" or "Purse Song"); and that complainants' corresponding Columbia Record is a double-faced record, having the Alfred song on one side and the Purse Song on the other. This goes to indicate that these two selections have been coupled together by complainants' commercial disc; and that defendant, when he undertook to counterfeit the Alfred song, by mistake obtained a counterfeit of the Purse song (from the reverse of complainants' article).

The Forbush and Emerson affidavits show that the affiants compared each of the three first-named Continental Records with the corresponding genuine Columbia Record; that on each Continental Record they found a number of "blemishes" and individual peculiarities; and that on the corresponding Columbia Record they found in each case the same blemishes, similarly located. These details are set out in the Forbush affidavit; and the presence (in the Continental and the Columbia) of the plurality of such

blemishes, puts the resemblances beyond "coincidence", and demonstrates that the two records came from the same original rendition of the song.

More than this, the two affiants Forbush and Emerson show that each of the three Continental Records aforesaid was obtained from one of the commercial articles put out by on the market by complainants. For instance, with regard to Continental No. 356, we refer to the presence of the faint, yet still perceptible "laboratory number" of complainants' record; with reference to the Continental No. 302 and the Continental No. 676, we refer to the indications of the erasure of complainants' "laboratory number"; and to the two "dimples" referred to by Forbush in connection with Continental No. 676.

The second Massie affidavit recites briefly a number of "coincidences" peculiar to each of the remaining Continental Records when compared with the corresponding Columbia Record, - notably the traces or remains of complainants' "laboratory number" which can be observed and recognized on several of defendant's counterfeits. The Court is familiar with cases involving copyrighted directories, mathematical tables, etc.; where the publisher of the genuine work purposely inserts various fictitious items, or certain incorrect figures, - as clues by which to determine whether a competing publication is a copy of his own or an independent compilation. Although the "blemishes" our affiants have referred to were not purposely introduced, yet they serve the same purpose, showing that the defendant's records are not independent executions of the particular Grand Opera selections, but are copies made from our records.

If one Continental record and one Columbia record should each show one single blemish common to both, and similarly located, that might be an accident. If they presented two blemishes common to both, that also might be a "coincidence". But the plurality of blemishes common to both the Continental and the Columbia, shows that there is no "coincidence"; and such identity of unnecessary features (blemishes) referring to a plurality of Continental Records and the corresponding Columbia Records, puts the matter so far beyond question as to amount to a demonstration that the Continental Records are counterfeits made from complainants' Columbia Records.

Defendant cannot, and (we think) will not deny this. If he does deny it, only two alternatives remain: (1) either he must assert that his Continental Records are obtained from original recordings made (for him) by the various singers under exclusive contract with us, and therefore in violation of said contract; or (2) defendant must assert that his Continental Records, which purport to be by Signor Bonci, etc., were in fact obtained from original recordings sung for him by some unknown singer. This last alternative would be such a gross fraud upon the public, and such an injury to the reputation of the artists, that it is not conceivable. Moreover, the facts already pointed out show that it is not the true explanation.

If the defendant should allege that he has suborned our various artists, who are receiving from us large royalties in consideration of the exclusive nature of their services, - if defendant is inducing those artists to

violate their contracts, then defendant is clearly liable to injunction under

Angle v. Chicago, 151 U.S., 1;

Bitterman v. Louisville & N. R. Co., 207 U.S., 205.

So that whichever alternative he might assert, he is guilty of a grievous wrong, and should be enjoined.

But, we repeat, the proofs demonstrate that defendant is making a regular business of wholesale piracy of our business, by unfair means, in obtaining counterfeit copies from our commercial records, - obtained by us from specially executed selections made for us by the renowned artists, under exclusive contract with us, and with the assistance of our experts and laboratory facilities.

Assuming these facts to be established, we now proceed to show the legal effect.

ARGUMENT.

I.

That complainants' is a legitimate business and a profitable one, that defendant's methods are unfair, and that (unless enjoined) defendant will divert to himself great gains, and complainants' legitimate business will be irreparably injured thereby, - are so manifest as to require no further elaboration.

The only conceivable opposition will perhaps consist of the proposition or argument that our motion papers present a case for which the law provides no remedy; and that the only "unfair competition" which a Court of Equity will enjoin is the "palming off" of a defendant's goods as the product of the complainant.

But this is not correct: There are other forms of unfair competition; and a Court of Equity will enjoin any unfair competition which consists of diverting to one's self, by any unfair means, the legitimate business of another, - even where there is no palming off.

A recent text writer on Unfair Competition says:

> "The right to free and unrestricted competition is freely admitted, but such competition, to be legal, must be honest, and the Courts will not countenance fraud or dishonesty under the guise of business competition. The rules which have become established for the determination of such questions enforce a strict code of business morality, and are highly honorable to the courts by which they have been developed. As said by a learned Judge: 'The gradual but progressive judicial development of the doctrine of unfair competition in trade has

shed lustre on that branch of our jurisprudence as an embodiment, to a marked degree, of the principle of high business morality, involving the nicest discrimination between those things which may and those which may not be done in the course of honorable rivalry in business'. [Dennison Mfg. Co. v. Thomas Mfg. Co. (1899) 94 Fed. 651]. This branch of the law is still growing, and the tendency is to restrict the scope of the law of technical trade-marks, and to extend that which covers unfair competition. The course of the decisions marks a distinct tendency towards the protection of persons in legitimate business enterprises from the inroads of dishonest competitors, and it is now thoroughly settled that a court of equity will enjoin those who, through unfair competition, seek to deprive others of the legitimate results of their skill and enterprise, irrespective of any question of trade-mark." [The learned text-writer then remarks that hence 'palming off' will be enjoined. But that is only one instrumentality of competing unfairly.]

Paul on Trade Marks and Unfair Competition, Sec. 207, pp. 373-4.

See also Nashville etc. R.Co. v. McConnell, 82 F. R. 65, Fifth Syllabus, and p. 76-7, citing In re Debs, 158 U. S. 565, to the effect that want of precedent is no bar to the application, to a new state of facts, of the equitable remedy of injunction.

We shall in an Appendix consider certain analogous lines of decisions, viz: "The Stock Ticker Cases" (approved and affirmed by the Supreme Court in

Board of Trade v. Christie, 198 U. S. 236, and in Bitterman v. Louisville & N. R. Co., 207 U.S. 205); "The Railroad-Ticket Scalpers Cases" (affirmed by the Supreme Court in the Bitterman Case, supra); and "The Trading-Stamp Cases" (also approved by the Supreme Court in the Bitterman case, supra).

II.

The Bill alleges, and it is the fact (see Cromelin affidavit, p. 2), that the Grand Opera artists in question are under exclusive contract not to give their services in making sound-records for any other talking-machine interest - a negative covenant. Had defendant gone in person to any of these artists, and induced the latter knowingly to violate that negative covenant and make a record for the defendant, injunction would surely lie.

Angle v. Chicago R.Co., 151 U. S.1;

Bitterman v. Louisville & N. R. Co., 207 U.S.205.

What defendant has done, and is threatening to continue, is the same in effect and results as if he had thus suborned these artists to violate their exclusive contracts. By counterfeiting the specially executed records made by those artists, defendant procures for himself the special, unique, extraordinary, personal and irreplaceable services of our Grand Opera singers, - to say nothing of procuring for himself the services (of similar quality) by our experts, and the benefit of our special laboratory apparatuses, etc.

So far as the resulting duplicate sound-record is concerned, and so far as the benefit to defendant and the injury to complainants are concerned, no real distinction exists between what defendant is doing and the supposed case of actual personnal subornation of our artists and experts.

And since Equity looks at substance and not at form, and since defendant's action is in substance the same as if he had directly procured those artists to violate their contract with us, - then, in the view of Equity, defendant is in fact procuring the violation of the contracts by our artists, and he should be enjoined.

III.

The Cromelin affidavit shows (bottom of p. 3) that the Grand Opera stars, at the time of singing these specially-executed selections for complainants, trace their autograph signatures upon the original sound-record; and that this signature is reproduced in fac-simile upon the commercial duplicates which complainants place upon the market. It appears that defendant, in copying these records, erases or removes the autograph signature, and then puts out his counterfeit record as a duplicate of the original made by that artist, - although such original bore the artist's autograph signature. This erasure or removal of the signature, - an unauthorized act - is itself a kind of forgery.

But there is forgery in a broader sense, in the unauthorized reproduction or counterfeiting of the original record-grooves of these specially executed

selections (with or without the question of signature). The original record-groove is, in actual verity, the "autograph" of the voice of the singer. Such original sound-record-groove is something "written" by the voice itself; and defendant's unauthorized copying or counterfeiting of this original sound-record-groove is therefore a forgery of the "voice autograph" of the artist, - and should be enjoined.

IV.

Ground for Preliminary Injunction.

Complainants have established and are now maintaining an enormous "going business" in these specially-executed Grand Opera records (the business of making and supplying "Columbia Records, Fonotipia Series"), which business will be irreparably injured if the defendant should escape injunction. On the other hand, defendant has not yet established any business; he is merely preparing and threatening to do so; he has put out only a few specimens, and is now doing little more than getting ready, and merely soliciting orders. If this Court of Equity puts forth its protecting arm to maintain the status quo, and to safeguard complainants' established business, it will not be striking down an established business of defendant's.

In a case so clear as the present one, a preliminary injunction will be a true kindness to defendant. It will prevent him from heedlessly building up, from the very foundations as it were, and perhaps at a considerable expense to himself, a more or less success-

ful business that will ultimately have to be overthrown entirely by the final decree. The preliminary injunction will merely direct the defendant to withhold his further efforts until final adjudication. It will merely maintain the present status quo. On the other hand, a refusal of preliminary injunction will invite the defendant to proceed with his preparations and, under the apparent sanction of a Federal Court of Equity, to build up an ever-increasing business, in unfair competition with complainants. And a refusal of the injunction will likewise encourage others to imitate this defendant's piracy.

Finally, a defendant can appeal at once from an order granting preliminary injunction, and by claiming a preference he can obtain a speedy determination by the Court of Appeals. There is no appeal from an interlocutory order refusing injunction.

For all the foregoing reasons we ask that this Court grant us the preliminary injunction prayed for in our Bill.

Respectfully submitted,

Philip Mauro

C. L. Massie,

Of Counsel for Complainants.

Dated, New York City, February 16, 1909.

We have not been able to find any reported decision upon facts precisely like those here presented. About four years ago a somewhat similar state of facts was before his Honor Judge LACOMBE in the Southern District of New York, in Victor Talking Machine Co. v. Armstrong et al., (132 F.R., 711). The equities in that case were not near so strong and convincing as those here presented, and the decision rendered in favor of the Victor Co. involved certain additional features of ordinary "unfair competition". In the first long paragraph of his opinion, Judge LACOMBE sets forth the pertinent facts and adds:

> "The complainant contends that defendants have no right to take the disks which it produced as records of a piece of music specially executed, and reproduce from them duplicates thereof. The novel and interesting question thus presented need not now be discussed."
>
> (Middle of p. 712 of 132 F.R. - Italics ours).

In that case it appeared that the defendants not only copied the Victor Co's "specially executed" sound-records but also imitated the Victor records in color, arrangement of label, catalogue numbers, etc. For the purpose of preliminary injunction, Judge LACOMBE granted relief to the extent that the defendants were enjoined from simultaneously counterfeiting the Victor records themselves and at the same time imitating the Victor labels, etc.

The question not decided by Judge LACOMBE, is squarely presented here. And the same broad principle

we here invoke has been recognized and applied in the cases discussed below.

"STOCK-TICKER CASES".

National Telegraph News Co. vs. Western Union Telegraph Co., 119 F.R., 294; 56 C.C.A., 198; (Judges JENKINS, GROSSCUP, and BUNN).

The Western Union had built up a legitimate business which consisted of collecting news at its numerous offices, reporting the same to its central office, and thence distributing said news, by local wires, to its "stock-tickers" which were placed in the offices of brokers, bankers, etc., and in hotels, saloons, and other places of general resort, where any person who chose could drop in and read the reports. The proprietors of the offices etc. where the "stock-tickers" etc. were located paid the complainant for this service (see p. 295 of 119 F.R.).

Complainant was at great expense in gathering and transmitting the news; in maintaining the instrumentalities, (its offices, wires, etc.); in paying for the services of the men gathering the news, and of the "editors" in the central office; meeting additional outlays for installing new instruments as the business expanded, etc., etc. (p.296).

Defendant would read the reports transmitted by one of complainant's tickers, (as it had a perfect right to do); but shortly thereafter would distribute the same through its own wires, and to its own customers, - with no expense of original collection of the news. Complainant and defendant were not competing on even terms; defendant's con-

duct was not fair. If, on account of its additional burden of collecting the news, the complainant could not furnish it at so cheap a rate as defendant, complainant would be forced out of business (and then defendant would have no reports to pirate), and the public would be deprived of this extensive and valuable service (p. 296). The Court found, in an extensive discussion, that not only was there no copyrighted subject-matter, but that the copyright laws would not apply (pp. 296-8); and asks "Is there any remedy that will protect appellee [the complainant below], in this feature of its business, against the piracy of outsiders?" (p. 299).

The business was shown to be an entirety and a lawful one (just as our business in putting out these specially-executed Grand Opera Records); it was found to involve the use of property (just as in the case at bar), which the Court showed brought it within the protecting care of Courts of Equity. The Court noted that the subject-matter or business involved was not any one particular message, still less any one particular piece of tape (or other tangible article). The stock-tickers, the wires, and the tape with characters printed thereon, were found to be merely instrumentalities for supplying the service to the public, - and constituted merely the tangible means for carrying on the extensive business or property vested in complainant.

"The case under consideration may be summed up as follows: The business of appellee is that of a carrier of information. The gist of its service to the patron is, that, by such carriage, the patron acquires

knowledge of the matter communicated earlier than those not thus served. The ticker, with its printed tape, is an implement or means only to this commercial end, which the patron, or the patron's patron, may utilize to the end intended, but may not appropriate to some end not intended, especially if such appropriation result in injury to, or total destruction of, the service. In short, the law being clearly inadequate to that purpose, equity should see to it, that the one who is served, and the one who serves, each gets what the engagement between them calls for; and that neither, to the injury of the other, shall appropriate more." (p. 300. Italics ours).

So, in the case at bar, the subject-matter is our general business, in its entirety, of supplying the American public with these specially-executed Grand Opera Records, rather than any one particular duplicate sound-record, or any one particular counterfeit thereof made by the defendant.

And, as in the foregoing case, it is the intention of the Grand Opera singer that the record of his voice, the specially-executed sound-record, be given to the public only in consideration of the royalty paid him for each and every duplicate - and it is offered to the public only with the intention that it shall be used upon a talking-machine, and in return for the price paid therefor to complainants.

Illinois Commission Co. et al. vs. Cleveland Tel. Co. et al., 119 F.R., 301; 56 C.C.A., 205; (Judges JENKINS, GROSSCUP, and BAKER).

The same rule was applied to a state of facts

similar, yet somewhat different, to those in the preceding case. ~~xxxxxxxx~~

The complainants therein had an exclusive contract with the Chicago Board of Trade, whereby they were transmitting its stock quotations through their wires, to be delivered upon stock-tickers located in the offices of customers of complainant; the customers were paying the complainants large sums of money for the service; and the complainants were paying the Board of Trade large sums for the exclusive privilege.

The defendant got the quotations from one of these stock-tickers (as defendant or any one else had the perfect right to do), but defendant then proceeded to transmit the same, at cheaper rates, to customers of its own. Injunction was ordered.

Sullivan vs. Postal Tel. Co., 123 F.R., 411; 7th C.C.A. (Judges GROSSCUP, BAKER, and ANDERSON).

In this case the two previous decisions were approved and followed.

Board of Trade vs. Cella Co., 145 F.R., 28; 75 C.C.A., 28; (Judges SANBORN and HOOK).

In this case the Court of Appeals for the Eighth Circuit followed the first two cases above-named.

Board of Trade of the City of Chicago vs. Christie Grain & Stock Co., 198 U.S., 236; 25 S. Ct., 637; 49 L. Ed., 1031.

In this case the Supreme Court affirmed the decisions above set forth, approving the doctrine we invoke, viz: that a Court of Equity will enjoin a defendant from diverting to himself, by any unfair means, a legitimate business of another

Bitterman vs. Louisville & Nashville RR. Co., 207 U.S., 205, 222-3; 28 S. Ct., 91; 52 L. Ed., 171.

In this case the Supreme Court approved the doctrine of the stock-ticker cases above set forth.

RAILROAD TICKET SCALPERS CASES.

Nashville &c. Ry. Co. v. McConnell et al., 82 F.R., 65; (Judge CLARK).

A number of Railroad Companies had been induced to offer, at reduced rates, non-transferable round-trip tickets to the Nashville Exposition. The ticket-scalpers were practicing the purchase of the return-coupons, which they sold to others, sometimes assisting the latter in attempting to make use of them. Injunction was granted. Among other things, the Court held:

> That the amount in controversy is not the amount to be recovered from the defendant, but the value of the right that is to be protected, or the extent of the injury to be prevented (Syllabus 3; and p. 74, citing Scott vs. Donald, 165 U.S., 107).
>
> That it is no bar to the granting of injunction that the proposed use of the writ for the particular purposes is novel. The recognized principles of equity jurisprudence, as regulated by analogy, will be applied even to a new state of facts (Syllabus 5; and pages 76-7, citing In re Debs, 158 U.S., 565).

That the right to carry on a lawful business without obstruction is a property right, and will be protected in equity by injunction (Syllabus 6; and pages 80 et seq., citing Scott v. Donald, 165 U.S., supra, and other cases).

That the suit was held not to be based upon violation of the contract (printed on the ticket, and existing between the Railroad and the original purchaser); the subject-matter is the illegal use of the ticket by the scalper, or his causing the new purchaser to use it illegally, or his causing the original purchaser to violate the contract. Hence, the legal remedy (of forfeiture) provided by the contract itself, is no bar to the equitable remedy of injunction (Syllabus 7; and pages 83 et seq.).

That "irreparable injury" does not necessarily mean injury beyond the possibility of repair etc., nor necessarily great injury; but that species of injury, whether great or small, that is of such constant and frequent occurrence that no fair or reasonable redress can be had therefor in a court of law (Page 69, quoting authorities).

That ticket-brokerage, or "scalping" is condemned as unfair (pp. 83-5). And the language of the Supreme Court in Angle vs. Railway (151 U.S., 1) as to enjoining a defendant from his "malicious" causing of one party to the contract to violate it to the injury of the other party to the contract, - is explained as not meaning that proof of a malevolent intention is requisite to the granting of the injunction; because (says the Court) the only "malice" involved in the

an unfair gain for himself at the expense of complainant (Id., p. 71).

And, finally, that the aggrieved party need not wait until the wrong-doer has actually consummated pecuniary damages by his unfair competition, to the extent of the jurisdictional amount, $2000.00, before making his application to the Circuit Court, as a Court of Equity. It is sufficient if the right which is to be protected, or if the threatened injury to be consummated, will amount to that sum (P. 74, citing Scott vs. Donald, 165 U.S., supra).

Louisville & Nashville RR. Co. vs. Bitterman, 128 F.R., 176; (Judge PARLANGE).

This case concerned re-selling by ticket-scalpers non-transferable of return-coupon of round-trip tickets to the Mardi Gras, which complainant put out at reduced rates. The Circuit Court granted an injunction, limiting it only to tickets of the kind that had already been put out by the complainant.

Same vs. Bitterman, 144 F.R., 34; 75 C.C.A., 192.

On appeal the Court of Appeals for the Fifth Circuit (Judges PARDEE and SHELBY - Judge McCORMICK dissenting) not only affirmed Judge PARLANGE, but granted even greater relief. The defendants were enjoined not only [illegible] Mardi Gras, but of all such tickets to be issued from time to time in the future.

Bitterman vs. Louisville & Nashville RR. Co., 207 U.S., 205; 28 S. Ct., 91; 52 L. Ed., 171.

The Supreme Court affirmed the two decisions last quoted, besides approving the stock-ticker cases already set forth.

Illinois Central RR. Co. vs. Caffrey et al., 128 F.R., 770; (Judge THAYER).

On similar reasoning, injunction was granted against ticket-scalpers to prevent their handling return-coupons of non-transferable round-trip tickets sold at reduced rates to the St. Louis Exposition. On pp. 773-4 the Court shows that injunction should be granted, upon clear proof of threats, and without waiting for the actual commission of the injury. So, here, the injunction should be granted upon the publication and distribution of the circulars and catalogues, even if there had been no actual sale of the counterfeit sound-records.

Pennsylvania Co. vs. Bay, 150 F.R., 770; (Judge KOHLSAAT).

This suit also was regarding non-transferable round-trip tickets to the St. Louis Exposition, sold at reduced rates. The Railroad Company was held to have a present property interest in the right to issue special non-transferable tickets and to have same maintained as non-transferable, either where already issued, or to be issued from time to time in the future; and such Company may maintain a suit in equity to protect such right by injunction against brokers, etc.

The "crux" of this Bay case was said to be:

"the power of the court to enjoin defendants from dealing in the future in special non-transferable

tickets not yet issued, as to which the special occasion for their issuance has not arrived or even been specifically conceived" (p. 774).

And this right was upheld. So, in the present case, this defendant should be enjoined not only from counterfeiting the Grand Opera Records which he has listed in his catalogue, and not only from counterfeiting the specially-executed Columbia Fonotipia Records which we have put out and listed in our catalogues, but also from counterfeiting any other sound-records which complainants may hereafter put out.

In the Bay case it did not appear directly that all the defendants had dealt unfairly in complainant's return coupons; but that the business of the defendants was such "that in pursuing it they must needs have done so and continue so to do" (p. 772).

Decisions were cited to show that the Railroad had the right to issue the tickets at reduced rates; it was shown that this was a benefit to the public as well; this and the previous causes indicate that complainant could either withdraw its reduced rate tickets (to the corresponding injury of the public), or bring a separate action at law upon each coupon thus resold. The Court found, however, that the subject-matter in dispute was not merely the protection of each particular ticket, but of the broad right to issue them and maintain the railroad's general plan or scheme.

Finally, the Court enunciated two broad propositions: (1) complainant has a present property right in its plan or method, viz: a right to issue such evidence of transportation (whether already issued or to be issued from time

to time in the future) and to have that right maintained by a Court of Equity; and (2) that defendant's threats to deal in the return-coupons to their own advantage was a wrong, and in fraud of complainant's right, - which will be enjoined.

THE TRADING-STAMP CASES.

Sperry & Hutchinson originated an advertising scheme which involved three classes of parties, viz: themselves (hereinafter called complainant); certain merchants, hereinafter called "subscribers"; and the purchasing public at large, hereinafter called "customers". Complainant supplied its "subscribers" with the trading-stamps, which were to be given to the customers, one for each ten cents of purchase; when a customer had collected a certain number of these stamps, the complainant would redeem them from him. The complainant extensively advertised this scheme and the business of each of its subscribers. There was further a contract between the complainant and each subscriber, that the trading-stamp should remain the property of the former, but that contract was not made known to the customers. Originally the trading-stamps were not marked as non-transferable, but it appears from some of the later decisions that ultimately they were so marked.

The various defendants had at different times acquired numbers of these trading-stamps, some by purchase from the subscribers (who had no right to sell them), and others from the customers (who were under no obligation not to dispose of them).

The defendants then made use of these genuine stamps, the genuine output of complainant, to divert to themselves the profits from the legitimate advertising business thus created by complainant. There was no question of "palming off". Among the cases are:

Sperry & Hutchinson v. Mechanics Clothing Co., 128 F.R., 800; (Judge BROWN, R. I.);

Same v. Same, 128 F.R., 1015;

Same v. Same, 135 F.R., 833;

Same v. Brady, 134 F.R., 691; (Judge HOLLAND, E. D. Pa.);

Same v. Asch, 145 F.R., 659; (Judge McPHERSON, E. D. Pa.);

Same v. Temple, 137 F.R., 992; (Judge PUTMAN, Mass.);

Same v. Weber, 161 F.R., 219; (Judge KOHLSAAT, N. D. Ill.), - which, on page 221, refers to four unreported decisions to the same effect, viz:

By Judge MORRIS, Md.;

By Judge McPHERSON, E. D. Pa.;

By Judge THOMAS, E. D. N. Y.;

By Judge LACOMBE, S. D. N. Y.

The first of the foregoing decisions (128 F.R., 800) was approved by the Supreme Court in -

Bitterman vs. Louisville & Nashville R. Co., supra. (207 U.S., 205, 222).

In deciding the Mechanics Case (135 F.R., 833, supra), Judge BROWN said it could be assumed that a collector of the trading-stamps (a "customer") could lawfully transfer them to others, to be used in the same manner, that is, for redemption by complainant; and that the defendant might lawfully purchase the trading-stamps from a number of "customers" and present them for redemption.

He noted that any merchant might purchase a quantity of street-car tickets or the like, and give them out to his customers as a bonus; and asks, why may he not so use complainant's trading-stamps? The business as a whole, rather than the trading-stamp itself (he observes), is the real subject-matter of the controversy, - which business was regarded as a sort of advertising business, of which the trading-stamp was merely an instrumentality or a "token".

The scheme of distributing and advertising the trading-stamps was a very effective and profitable means of advertising, which benefited the "subscribers" by their increased sales, and benefited complainant solely by reason of the number of stamps it sold to subscribers. The defendant's wrongful act consisted of undertaking to procure for themselves a trade advantage as distributors of those same trading-stamps.

On page 835 of 135 F.R. the Court says (italics ours):

> "The trading stamp company has made large expenditures to create a demand, and, although its sole source of profit is in the sale of rights to supply this demand, the defendants, who have not paid the trading stamp company for this right, assert that they have acquired it equally with those merchants who have paid for it. By reusing the stamp as an advertisement, they seek to get for nothing what others are required to pay for, and to institute a destructive competition with authorized merchants, which tends to destroy the value of the stamp and to injure the complainant's business."

. . . . . .

"But, it is asked, why, if the right of a customer to transfer it is conceded, may he not transfer it in any mode he pleases, and give it as an advertisement if he sees fit? A sensible answer to this question, I think, is this: Because he thereby appropriates to himself the trading stamp company's legitimate share of the transaction."

The Weber case (161 F.R., 219, supra) was before Judge KOHLSAAT. In that case it appeared that "customers" were to present their stamps for redemption only when they had collected a certain number (about one thousand); and that defendants were buying them from a number of customers who had individually collected much smaller amounts, and defendants were advertising that they would give them out to their own customers (to be redeemed by complainant), but at a more liberal rate than complainant's "subscribers", and defendants were likewise presenting these large lots of trading-stamps for redemption by complainant. As in the foregoing case, it was held that the defendant might lawfully purchase individual stamps from customers, and that the mere presentation of such stamps by a customer's assignee, for redemption, would not be a wrong; but, on p. 221 of 161 F.R., the Court said:

"It is the essence of complainant's business that its subscribers shall get the full benefit of its methods of advertising and assistance. Its stamps are not, in the full sense, property. Their nontransferability is an essential element of their value, both to complainant and its subscribers. It may be assumed that both parties are in the transaction for profit. It is not fair to say that complainant's

only interest consists in the presentation of the stamps for redemption, if the means employed to that end result in killing the demand of subscribers for the stamps. The parties are entitled to carry on their affairs in such a way as to serve the business interests of each, so long as they are lawfully conducted. To create an unfair market for partly filled and nontransferable stamp books would have a tendency to keep purchasers from trading with subscribers until they were filled."

These trading-stamp cases, like the stock-ticker cases and the ticket-scalping cases, do not present identically the same facts that appear in the case at bar. But they do show plainly that unfair competition may be carried on by other actions than merely "palming off." They further show plainly that the Courts will not permit a defendant to take an unfair advantage, and to get for himself, without paying for it, the benefit of valuable rights for which a complainant has paid full consideration.

CONCLUSIONS.

From all the foregoing, it appears that complainants are entitled, upon reason and authority, to a preliminary injunction;

That the injunction should forbid the counterfeiting of any and all sound-records put out or hereafter to be put out by complainants;

That the subject-matter is our aforesaid business, as an entirety, rather than any one particular disc record;

That defendant should be enjoined pendente lite, not only from counterfeiting our sound-records, but also from distributing catalogues, circulars, etc., or otherwise offering to supply such unlawful records;

That complainants need not wait until $2000.00 worth of damages have actually been inflicted, but may apply for and obtain injunction at the outset;

And, that our proofs of the threats and preparations to counterfeit would suffice to warrant the injunction, - but we likewise have actual proof of the putting out by defendant of certain specimens of his counterfeit records.

Respectfully submitted,

Philip Maura

Calmasie,

Of Counsel for Complainants.

Dated, New York City, February 19, 1909.

IN THE CIRCUIT COURT OF THE UNITED STATES,

For the Eastern District of New York.

In Equity.

FONOTOPIA LIMITED, and THE COLUMBIA PHONOGRAPH COMPANY (General)

Complainant,

--vs--

W I N A N T V. P. B R A D L E Y,

Defendant.

STATE OF NEW YORK,
SOUTHERN DISTRICT OF NEW YORK, :
CITY AND COUNTY OF NEW YORK.)

WINANT V. P. BRADLEY, being duly sworn, deposes and says: I am the defendant above named.

I have resided in Brooklyn, N. Y. for forty-nine years last past, and have been there domiciled, excepting that from 1902 to 1906 I was domiciled in Ohio, retaining my legal residence in Brooklyn.

In the year 1898 I became identified with the talking machine business of the National Gramophone Company, which was the pioneer of the world in the disc talking machine business.

Since that time I have been an employee or officer or have sold the product of the following corporations organized under the laws severally indicated.

The National Gramophone Corporation of New York.

The Universal Talking Machine Company of New York.

The National Phonograph Company of New Jersey.

The Talkophone Company of Ohio.

The International Record Company of New York.

The Continental Record Company of New York,

and others.

I am familiar with the history and development of the talking machine business, which is disclosed sufficiently for present purposes in several suits in various courts of the United States reported as follows:

Edison Phon. Co. v. Hawthorne & Shebley, 108 F.630.
" " " v. Kaufman, 105 Fed. 960.
" " " v. Pike, 116 Fed., 863.
" " " v. Victor T.M.Co., 120 Fed.,305.
" " " v. Swiftky, 128 Fed., 1023.

Am.Grapho.Co. v. Armet, 74 Fed., 789.
" " " v. Edison Phon.Works, 68 Fed., 451.
" " " v. Hawthorne & Schebley, 92 Fed.,516.
" " " v. Leeds, 77 Fed., 193.
" " " v. " 87 Fed., 873.
" " " v. Nat. Gramo. Co., 92 Fed., 364;
" " " 34 C.C.A., 412.
" " " v. " " , 90 Fed., 824.
" " " v. Talking Mach.Co., 98 Fed., 729;
39 C.C.A., 245.
" " " v. Walcutt, 86 Fed., 468.
" " " v. " , 87 Fed., 566.
" " " v. Nat. Gramo. Co., 105 Fed., 434.
" " " v. Univ. T.M.Co., 118 Fed.,1020.
" " " v. Leeds & Catlin, 131 " 281.
" " " v. " " " 140 " 981.
" " " v. Nat. Phon. Co., 127 " 349.
" " " v. Talkophone Co., 140 " 989.
" " " v. American Record Co,151" 595;
81 C.C.A., 139.
" " " v. " " " 145" 643.
" " " v. Int. Record Co., 155 " 427.
" " " v. Leeds & Catlin, 155 " 427.
" " " v. Univ.T.M.M.Co., 151 " 595;
81 C.C.A., 139.
" " " v. " " " 145 " 636.

Victor Talk.Mach.Co. v. Am.Graph.Co.,118 Fed., 50.
" " " " v. Fair, 118 " 609
" "" " " v. Am. Graph.Co.145 " 350;
76 C.C.A.180.
" " " " v. " " " 131 Fed. 67;
65 C.C.A.305.
"" " " " v. " " " 140 Fed.,860.
" " " " v. " " " 125 " 30.
" " " " v. Armstrong, 132 " 711.
" " " " v. The Fair, 123 " 424;
61 C.C.A. 58.
" " " " v. Am.Graph.Co. 145 Fed.,350;
76 C.C.A.,180
" " " " v. " " " 151 Fed.,601;
81 C.C.A.,145
" " " " v. " " " 145 Fed.,188.
" " " " v. " " " 145 " 189.
" " " " v. Hoschke, 158 " 309.
" " " " v.Leeds & Catlin148 " 1022
79 C.C.A.536
" " " " v. " " " 146 Fed.,534.
" " " " v. " " " 151 " 47.
" " " " v. Talkophone Co148 " 1022;
79 C.C.A.536
" " " " v. " " 146 Fed.,534.

Am.Graphe.Co.	v. Nat.Gramo.Co.,	90 Fed.,	824.
" "	v. " "	92 "	364.
" "	v. " " "	105 "	434.
" "	v.Univ.T.M.M.Co.,	118 "	1020.
Berliner Gramo.Co.	v.Frank Seaman	110 "	30.
" "	" v. " "	113 "	150.
Frank Seaman	v.E.T.Johnson,	106 ""	915.
Eldridge T.Johnson,	v.FrankSeaman	108 "	951.
U.S.Gramo.Co.	v. Frank Seaman	113 "	745.
Berliner Gramo.Co.v."	"	111 "	679.

I will proceed to make a summary of such history, in order that the Court may be advised in regard to the business and parties presented before it in this suit:

In the year 1878 Thomas A. Edison took out the first patent upon speaking machines; embracing the disc and cylinder types.

In 1888 The Bell and Tainter machines were invented of both disc and cylinder types.

In 1887 Emile Berliner produced sound-records upon discs by tracing and etching processes, and others followed.

From Berliner's work, and later from that of Bell and Tainter, were developed machines and records as manufactured by the Berliner Gramophone Company for and sold by the National Gramophone Company, and the National Gramophone Corporation, and subsequently other flat disc record machines and records were made and sold by the Universal Talking Machine Company, and then by the American Graphophone Company, and afterward by the Talkophone Company, Hawthorne & Schebley, Leeds & Catlin, and others, all of which makers employed flat disc records.

The disc records for all of these machines have been duplicated for the sale of the copies marketed commercially by the well-known electrotyping process describe

in patents issued to the inventors named and in other patents.

The business of making and selling talking machines for many years was a monopoly of Edison and Bell and Tainter, and later under decisions in relation to a certain patent to Berliner now before the Supreme Court of the United States, being No. 534,543, and one to Jones now before the Circuit Court of Appeals, for the Second Circuit, being No. 608,789.

That under said Bell and Tainter patent various persons and corporations were enjoined and restrained from doing business, at the suit of the American Graphophone Company, which controls the Columbia Phonograph Company, complainant herein, represented in said litigation by its present counsel, and that by reason of the great reputation of the said Edison Company, the issuance of that injunction was of great weight and accepted by the community, and those familiar with the business, as conclusive.

That, however, as I am now informed said adjudication was had under and pursuant to a contract between said litigants providing

> "Whereas it is believed by the parties that no commercially competitive machine can be manufactured without infringing the patents of both interests,"

and finally in agreeing--

> "to co-operate in sustaining all the patents heretofore mentioned, and proceed against all third persons who may infringe said patents, or any of them."

That thereafter, under said patent, a preliminary injunction was had against the National Gramophone Company, and later against the Universal Talking Machine Manufacturing Company.

That in the year 1903 an agreement was entered into between the said complainant and the Victor Talking Machine Company, of which a copy, partly suppressed, was proved in one of said suits, hereto annexed, and of which I am informed a complete copy is in possession of said complainant.

That after the execution of said contract each of said parties to the same sustained against the other one of the patents specified and thereafter proceeded on the basis of such adjudications, and procured temporary injunctions against the Leeds & Catlin Company, The Talkophone Company, The Universal Talking Machine Manufacturing Company, the International Record Company, and those doing business under the name Sonora Phonograph Company, and have unsuccessfully applied for injunctions against the Duplex Phonograph Company, Leeds & Catlin Company, and The Regina Company.

That the said Victor Talking Machine Company has issued and sent out various circulars concerning my business, of which I annex copies, having the originals ready to be produced, and I have everywhere been met by statements from the trade that they had been warned by circulars and by personal interviews against purchasing from me any records. Said circulars which I delivered to my Solicitor Mr. Morse, set forth that the Victor Company will cancel the trade agreements of all persons purchasing from me,

My own experience has made me personally familiar with the production and duplication of sound records, and the same have at various times been both made and duplicated by me and also under my direction.

While the statements in the moving papers herein are to a considerable degree correct, in some respects the same are inaccurate, mistaken or misleading, and I

will refer to certain corrections proper to be made, taking up the moving papers in the order of their service, and avoiding confusing details.

In the Bill of Complaint, while the statement is made that the complainants have paid large sums of money to various artists for alleged exclusive rights, the facts as more fully set forth disclose that such payments have been made solely by the Fonotipia Company, a foreign corporation, contracting in relation thereto and attempting to sell to the Columbia Phonograph Company certain rights in the United States purely fictitious, and that said payments have been by way of royalties upon records actually sold, and that the same are simply allowances from past profits and without relation to the future or present in any respect, and that the foreign artists named are the real parties having rights in regard to the alleged doings of the defendant, if any rights exist.

Also, I would call attention to the failure of complainants to set up the various contracts mentioned between themselves, and with said artists, or to disclose their exact terms by copy or otherwise in the affidavits, thus leaving the Court and the defendant without information in regard thereto upon which to base a conclusion, no more being stated in one instance than that an affiant satisfied himself as to a conclusion of law, such as should be drawn by the Court, from facts properly proved, that one of the complainants enjoys under contract certain rights specified.

I am advised and verily believe and charge to be the fact that the contract alleged to exist between complainants is in restraint of trade, made for the purpose of establishing a monopoly, in contravention of the

statutes and laws of the United States and of the State of New York, illegal and void, so that no rights may exist thereunder, or be enforced in carrying out the same, or in connection therewith.

Further, I wish to state that the art of recording and reproducing sound records is old and well known, having been fully described in many patents now expired, and that many persons in this and foreign countries are skilled in the art and able to produce results in all respects identical with those obtained by the complainants, as well in the recording as in the duplication of records which complainants in their bill truly aver may be so successfully accomplished by many persons, and that copies produced from commercial records as are those of the defendant are undistinguishable from those produced without said intermediate step.

As to the ability of others to make recordings in no way inferior to those of complainants, I refer to the Victor records, to the Zonophone records, of which I have sold thousands, the International Record Company's record, of which I likewise have sold thousands, and of which I have marked two for inspection - "Deft's Ex., International Record, No. 1, (and to 2) N.Y.P.", all of the same in the respects mentioned, equalling those of the complainant.

For many years all or substantially all flat talking machine records have been made in disc form, with paper labels impressed in the center, and until very recently carrying a record upon a single side, substantially in the form shown by said International Record and the Continental Records, double faced records, having been introduced recently.

I now refer to various matters in no way pleaded in the Bill of Complaint, but set forth in complainant's affidavits.

Both the European Fonotipia and the so-called Fonotipia, Columbia Series are double faced records which by no possibility might by the public be confused with the single faced records sold by the defendants.

The right of the public to employ records of the kind and quality sold by defendant is further appearent from the fact that the same are the subject of and fully described in numerous patents long since expired.

That the records sold by defendant and the corresponding so-called Fonotipia records severally "were obtained from the same specially executed original record" as claimed by complainant is doubtless true for I am informed that such records are made and sold in Europe and imported into this country and copied by the Columbia Phonograph Company as stated in their affidavits and in a different way and from such foreign made records fully finished and commercially sold, have been copied by the Continental Record Company, a corporation.

The laboratory marks and various blemishes upon the records as set forth in the various moving affidavits as well as the peculiarities in recording so set forth all are the results of conditions affecting the making of the original wax-recording or the first matrix, the one produced directly therefrom, or the master obtained from such matrix, in some or in all of these, so far as I am able to determine from inspection, and such peculiarities would persist in commercial pressings wherever made and would appear in records copied by the Continental Company from foreign pressed records.

The laboratory numbers upon the records of Con-

plainant to which reference is made as well as various other marks, I am able by an inspection of the same to determine to have been first cut in the wax or the master duplicating that and then reproduced in reverse in the pressing matrix in the manner above set forth so that the same are the laboratory marks of the Fonotipia Company appearing on their records so sold in Europe and which would consequently similarly appear upon records duplicated therefrom unless erased as seems to have been the case with the numbers and special markings specified in the moving papers.

I produce herewith one such commercial foreign made record having the said Fonotipia laboratory number 691632 and also the matrix made therefrom bearing in reverse said number and in each case certain private laboratory markings in writing made in the wax original.

Upon said matrix so produced appear the words duplicated faintly, in reverse as above explained, which were printed upon the label of said foreign pressed commercial record the said words having been obliterated from said label in the process of electrotyping.

I have marked said record "Fonotipia Foreign Record W.V.P.B." and the matrix the same, each with the title of this suit. I wish to correct the statement of the moving affidavits as to prices.

The price quoted by me for records is that to the wholesale jobber or first handler, the retail price being one dollar and twenty-five cents.

The price of the Columbia Company is quoted upon a double faced record at two dollars and fifty cents.

Both the Columbia Company, the complainant, and said Victor Company, lay claim to the exclusive right to sell the records of long lists of singers and artists and I find by comparison that certain artists are claimed exclusive-

ly by both said companies and so advertised to the public and in the papers in suits before this Court.

I wish to call the attention of the Court the total impossibility of reading upon records sold by me of any private mark or design or number whatsoever or any part of such private mark or design.

Also the fact that the records so sold in no way simulate those of complainants in appearance color or design ~~and~~ save in so far as all talking machine discs are similar in a general way.

Also that the one type is double faced and the other single.

And in conclusion state that there is no general similarity among the records of complainant, the Columbia Phonograph Company which is capable of protection as a trade asset, in so far as the selections produced are concerned.

I have always and to every purchaser stated that the records so sold by me are duplicated from records purchased from others in foreign countries.

Subscribed and sworn to before me this 19th day of February, 1909.

Edward A. Bradley.

Frank Cochrane

Notary Public (69)
New York County.

IN THE CIRCUIT COURT OF THE UNITED STATES
For the Eastern District of New York.

FONOTIPIA LIMITED AND THE COLUMBIA PHONOGRAPH COMPANY (GENERAL)

-vs-

WINANT V. P. BRADLEY.

In Equity.

STATE OF NEW YORK,)
COUNTY OF NEW YORK,) SS.:

WINANT V. P. BRADLEY, being duly sworn, deposes and says: I am the defendant in the above-entitled proceeding.

In the suit of the Victor Talking Machine Company against myself pending in this Court I have made an affidavit this day and beg leave to attach a copy thereof hereto as a part hereof.

The prices quoted by me are distributors' wholesale prices while those quoted by Complainant, the Columbia Co., are list or retail prices. Reduced to the basis of the cost for each records face there is no difference between the prices and discounts of said complainant and this defendant.

Sworn to before me this 2nd day of March, 1909.

Winant V. P. Bradley.

Frank Cochrane
Notary Public 669
New York County

IN THE CIRCUIT COURT OF THE UNITED STATES,

For the Eastern District of New York.

In Equity, No.

VICTOR TALKING MACHINE COMPANY, a corporation organized and existing under the Laws of the State of New Jersey,

Complainant,

--against--

WINANT V. P. BRADLEY, a citizen, resident and inhabitant of the Eastern District of New York.

Defendant.

STATE OF NEW YORK,)
: SS.:
COUNTY OF NEW YORK,)

WINANT V. P. BRADLEY, being duly sworn, deposes and says:

I am defendant in the above-entitled suit. I have heretofore made an affidavit in a suit pending in this Court, brought against me by the Fonotipia Limited, and another, and beg leave to annex a copy thereof hereto and make the same a part hereof.

The records sold and advertised by me for sale in so far as the same appear to be similar to complainant's so-called "red seal" records in the nature of the selections reproduced, were not made in any way from said records, as I am informed and verily believe, but

were made from records purchased in the Dominion of Canada. Some such records have been purchased by me personally, while other of said records have been purchased by others in said Dominion and copied for sale.

Said Victor records are to my knowledge, in many instances made from foreign recordings had by foreign corporations, and in at least one instance, that of the singer Antonio Bonci, both the complainant and the Columbia Phonograph Company claim to have exclusive rights in the reproduction of the records from his work, said Columbia Company alleging said recording to have been made in Europe.

Also many numbers alleged by complainant to have been recorded in this country represent the work of artists who never have visited the United States, and as to which of the recordings for complainant have been made in the United States, as alleged in the moving papers, I am not informed and have no means of information, if indeed any have been so made.

That as appears by the exhibits of complainant, certain records bear upon their backs restrictive endorsements, as follows:

"10 - inch AMERICAN VICTROLA RED SEAL RECORD.

"$2.00 "each. -- NOTICE. -- $2.00 each.

"This RECORD which is registered on our books in accordance with the number hereon, is licensed by us for sale and use only when sold to the public at a price not less than

--- TWO DOLLARS EACH ---

"No license is granted to use this record when sold at a less price.

"This record is leased solely for the purpose of producing sound directly from the record

and for no other purpose; all other rights under the licensor's patents under which this record is made are expressly reserved in the licensor. Any attempt at copying or counterfeiting this record will be construed as a violation of these conditions. Any sale or use of this record in violation of any of these conditions will be considered as an infringement of our United States Patents Nos.534,543, dated February 29, 1895, and 548,623, dated October 29, 1895,issued to EMILE BERLINER, and of our other U. S. Patents covering this record, and all parties so selling or using this record, or any copy thereof, contrary to the terms of this license, will be treated as infringers of the said patents, and will render themselves liable to suit.

"This record is only licensed for sale and use when and so long as this label remains upon it, any erasures on or removal of this label will be construed as a violation of this license. A purchase is an acceptance of these conditions. All rights revert to the undersigned in the event of any violation.

"March 1, 1906.

VICTOR TALKING MACHINE CO."

Certain other records bear labels upon their faces as follows:

"Awarded First Prize, Buffalo, St. Louis, and PORTLAND EXPOSITIONS.

Cut Talking Machine & Dog
His Master's Voice./

"Registered U.S. Pat. Off. Marca Industrial Registration.

"Victrola --Price $2.00 in U.S.A.-- Record.

English Soprano.

"BELIEVE ME IF ALL THOSE ENDEARING YOUNG CHARMS.
(Moore)

GERALDINE FARRAR.

Accompaniment by Victor Orchestra.
87025.

VICTOR TALKING MACHINE CO.; Camden, N. J.

"This patented record is covered by and made under our U.S. patents, among others No. 534,543, dated Feb. 19, 1895, and No. 548,623, dated October 29, 1895, both issued to EMILE BERLINER; No. 739,318 dated September 22, 1903, No.778,976 dated January 3, 1905, 896,059 dated August 11, 1908, and is licensed by us for sale and use only when sold at retail at a price not less than

the price marked upon the record and only for the purpose of reproducing sound direct from this record and for no other purpose. This license is good only as long as this label remains on this record, unaltered and undefaced. A purchase is an acceptance of these terms."

"Aug. 25, 1908.

VICTOR TALKING MACHINE CO."

while some records bear both said endorsements.

Until very recently the records of complainant were sold without any restrictive notice whatsoever, except the statement that they were patented, and many such records are now so sold, and many are in the hands of the trade and of the public, having been purchased absolutely and without condition, and the complainant is now engaged in withdrawing many such records by exchange for such as have restrictive endorsements.

Such restrictive endorsements are old and well known in the trade, having been employed and extensively used by the Universal Talking Machine Company as early as the year 1898, such endorsement appearing on "Defendant's Exhibit, Zonophone Record," a copy being hereto annexed.

That beside such restrictive endorsements, the records of complainant contain claims of patent rights as above indicated.

In the year 1895, the Berliner Gramophone Company, under Emile Berliner and the United States Gramophone Company, acquired for the United States alone the rights of said Berliner under and in his patents and inventions, and such rights were later acquired by the complainant which is now manufacturing and claiming under the same.

In the same year said Berliner established his business in the Dominion of Canada, being succeeded by the Berliner Gramophone Company, a Canadian corporation,

which ever since that time has enjoyed and now enjoys similar rights in said country to those by the complainant and its said predecessors, enjoyed in this country.

That similar separate and distinct rights have been granted and enjoyed in various European countries under said Berliner patents, similar to the rights enjoyed by said Berliner Company of Canada.

In the earlier practice of the art of sound reproductions by means of disc records, and prior to the securing of decisions establishing the validity of patents as between the complainant and the American Graphophone Company contracting in regard thereto, many persons and corporations reproduced or dubbed records, as is the phrase, from the commercial records of others: as Joseph W. Jones, A. T. Armstrong, Leeds & Catlin, C. B. Repp, United Talking Machine Company, Morris and Benjamin Keen, and others; and that later such dubbing has been carried on by the Columbia Phonograph Company and others.

That said Berliner Company of Canada, long copied or dubbed without permission, the records of the complainant, although the complainant attempted through the Courts of Canada, unsuccessfully to enjoin such practice or secure recognition of its alleged proprietary right in its said recordings, as I am informed and believe.

Whereupon, as I am informed and believe, a contract was entered into whereunder duplicate matrices were agreed to be sent by complainant to said Berliner Company for its use in pressing records in said Dominion, which records it was agreed should be there sold by it absolutely to its customers and the public generally.

I have no means of giving the exact terms of said contract, but that the same has been carried out substantially as above is generally known in both countries in question.

Such records were for a long time so pressed and absolutely sold and many are still so sold and I produce and exhibit herewith such record so purchased by me and marked "Defendants Exhibit, Berliner Canadian Record Unrestricted", with the title of this suit and my initials, the label thereon reading as follows:

"This record is pressed from Victor Talking Machine Company's Matrices.

"Licensed for sale and use in Canada only.

"His Master's Voice."

" Trade Mark Patented, Feb.24,1897.
"V I C T O R R E C O R D

--Grand Prize--

"Italian -- Il Segno -- Tenor.
Massenet's Manon
SIG.ENRICO CARUSO

3 81031 $2.00

"BERLINER GRAM-O-PHONE CO., OF CANADA, LTD.
Montreal.

"Awarded First Prize, Buffalo, St. Louis, and Portland Expositions."

Certain of said records are now sold with endorsements or labels upon the backs thereof as follows:

"NOTICE

"This record is licensed by us for sale and use only, when sold at not less than the price marked on the record, and solely for the purpose of producing sound direct from the record. All parties violating these conditions or otherwise infringing upon our rights, will be subject to suit and damages.

May 1, 1908.

THE BERLINER GRAMOPHONE CO.
of Canada, Ltd."

I produce and exhibit herewith such record so purchased by me and marked "Defendants Exhibit, Berliner

Canadian Record, Restricted", with the title of this suit and my initials.

Long prior to the commencement of this suit the complainant established a plan or course of business and entered into a contract with the American Graphophone Company as set forth in the affidavit hereinbefore referred to as a part hereof, and also and likewise made and entered into certain restrictive trade agreements with all persons to whom it sold any of its wares or machines, said agreements providing that said purchasers should sell the same only at particularly specified prices and should buy similar goods from no other person whatsoever except under the license of complainant, and prohibiting such customers of complainant from selling to any other person or persons engaged in said business or dealing in similar goods, saving only to such as had entered into contracts with complainant containing like restrictions and restraints upon their trade and commerce.

Such contracts were made by the complainant with various persons classified as "Distributors, Jobbers and Dealers" entitled to varying rights thereunder as provided, and were entered into by and through such persons with the complainant, and with each other, said contracts providing among other things for the exercise and enjoyment of exclusive rights and privileges in the sale of talking machines and talking machine goods by and between complainant and said persons, and by and between said persons so contracting among themselves, and it was stipulated and agreed that the persons so enjoying such privileges should be exclusively those so contracting and of whom the complainant herein should issue lists

from time to time, said complainant being given absolute power to suspend at its pleasure the rights of any such contracting party under said contract, whereupon others should be and become prohibited from dealing with the one so suspended. All of which has been carried out and lists issued embracing and cutting out persons so contracting or suspended from time to time.

All or nearly all of such contracts have been so drawn that they are executed and exist between complainant and various of said Distributors, Jobbers and Dealers severally embraced in a single contract and in series of contracts, and all of the same constitute a single agreement as to each series, and the various serieses together constitute a single agreement embracing and fixing the rights with complainant and among themselves of all of the parties to any of said contracts and to every party to any thereof.

Pursuant to such contracts the complainant has from time to time issued lists of persons with whom its said customers might trade, and has issued circulars calling the attention of its customers to said restrictive contracts and has sent the same into the various states and territories of the United States to the various persons with whom the complainant has entered into said contracts in the various states and territories of the United States in which the said customers are and have been doing business, and it has been engaged in commerce and business, the same existing and being carried on among and between the several states and territories and throughout the United States and in all the States thereof.

Said contracts, circulars, agreements and course of business so carried on by complainant constitute a conspiracy and combination in restraint of trade and of commerce and an unlawful restraint and monopoly, and relates to, affects and is carried out in and about and in the control of interstate commerce among the states and was intended so to be, and affects, applies to and controls such trade in articles which are unpatented and are open and free to the public outside of any and all patent rights and privileges whatsoever, and was intended so to do, and constitutes an agreement or combination among and between the various parties to said agreements to such effect, and was intended so to do.

I annex hereto a copy of one of said contracts marked "Defendant's Exhibit, Complainant's Contract" and make the same a part of this affidavit, and likewise a copy of a letter marked "Defendant's Exhibit, Complainant's Letter, No. 1", "Defendants's Exhibit, Complainant's Letter, No. 2", and "Defendant's Exhibit, Complainant's Letter, No. 3", and beg leave to annex an additional circular of complainant, marked "Defendant's Exhibit, Complainant's Circular", in case I am able to replace a copy of the same, placed in the hands of my solicitor and which cannot be found.

That the making of said agreements as aforesaid and the understandings and contracts had in relation thereto and in carrying out the same, are contrary to public policy, illegal and void, and contrary to the Act of Congress passed July 2, 1890, and to the Statutes of the United States in such case made and provided, and that the acts and proceedings of the complainant and those with it so contracting in the issuing of said circulars

Company and long sold by that Company without restriction.

And further deponent saith not.

Sworn to before me this 2nd day of March, 1909. } Thomas H. P. Bradley

Frank Cochrane
Notary Public, (69)
New York County.

(Notary's Seal)

and the carrying forward of said business, and in all of the acts and things aforesaid, and in the bringing of this suit in this Court and in seeking to prevent this defendant from duplicating and selling duplicates of said records so copied, are had and carried out as parts of said illegal combination and in aid of said monopoly, and to enable the complainant and it s said dealers to maintain the same throughout the United States of America contrary to said Statutes, and to the loss and damage of the People of the United States and of the defendant, and the restraint of such trade and commerce.

And the complainant, so claiming and seeking to enforce a monopoly by means of such course of dealing, also and in certain respects, as will appear by its labels upon its exhibits herein and circulars; claims to the public, and to this Court, to have and enjoy a legal monopoly under the Patent Laws of the United States wholly independently of said agreement in restraint of trade, and also and likewise by means of a limited or restricted sale or lease of its said records, to prevent the copying thereof as alleged to be done in the case of those sold by the defendant, by reason of which claims complainant as it now appears before this Court, showing and asserting the truth thereof, must admit itself to be fully and amply protected under the rules and principles established and adjudicated by the Courts of the United States and without seeking unusual and unprecedented aid from this Court.

In the case of one of complainant's records alleged to have been made by it under an exclusive contract, namely 6 records made by Madame Tetrazzini, deponent has known said record for many years. The same was recorded by one George K. Chency for the Universal Talking Machine

DEFENDANT'S EXHIBIT, KOMOPHONE RECORD.

Copy of Endorsement.

"UNIVERSAL TALKING MACHINE CO.

All rights reserved.

CONDITION OF LEASE.

"This record is leased upon the express condition that it shall not be copied or duplicated, and that the full right of property and possession immediately reverts to the UNIVERSAL TALKING MACHINE COMPANY upon violation of the above contract."

DEFENDANT'S EXHIBIT

COMPLAINANT'S CONTRACT.

DEALERS' CONTRACT. List prices, Net prices and discounts, terms and conditions of sale.

Agreement for the U. S. of America.

In force between the Dealers of Victor Machines, Records Horns and Accessories and the Victor Talking Machine Company of Camden, N. J.
(Subject to change and revision on notice from the Victor T. M. Co)

Issued by Grinnell Bros. 219 Woodward Ave, Detroit, M.

(It will be particularly noticed, that all Victor T. M. Records, horns, sound boxes and accessories are covered by letters patent owned and controlled by the V. T. M. and are licensed for sale and for use only under the conditions attached to the goods; and any sale or use of any of the goods in violation of any of the condition except as to modified price to the public on records, as herein provided, will be an infringement of the patents of the Company. It is distinctly understood, that nothing contained in this contract shall in any way otherwise affect the character of the conditions of the limited license, under which said goods are sold, as noted on the label attached to the goods, and that this contract is not intended to and does not take the place of the license attached to the goods, directly or indirectly.)

MACHINES.			LIST PRICES	COST TO DEALERS.
Victor	1st, with regular equipment		22.-	13.20
"	2nd, " " "		30.-	18.-
"	3rd, " " "		40.-	24.-
"	4th, " " "		50.-	30.-
"	5th, " " "		60.-	36.-
"	"Z", " " "		100.-	60.-
"	Monarch, Jr " "		17.-	10.20
"	" " "		25.-	15.-
"	" Special "	"	45.- 27.-	

HORNS.

	"B"	1.50	.90
	"C"	2.-	1.20
	"D"	3.-	1.80
	"M"	2.-	1.20
	"G"	3.-	1.80
	"E"	3.-	1.80
	"H"	4.-	2.40
	"J"	5.-	3.-
	"O"	7.-	4.20
	"K"	8.50	5.10
New	"L"	15.-	9.-
" Mahogany style	VI	15.-	9.-
No. 19 Victor Flower Horn		19" Bell	4.- 2.40
" 22 "	"	22" "	5.- 3.-
" 24 "	"	24" "	7.- 4.20

R E C O R D S.

Cash Prices	List-prices	Cost to Dealers.
7" Domestic	$ -.35	-.21
8" "	-.35	-.21
10" "	-5 0	-.40
12" "	1.00	-.66 2/3
7" Foreign, black label	-.50	-.30
10" " " "	1.00	-.60
12" " " "	1.50	-.90
10" " "Victrola" Red Seal	2.50	1.50
10" American Red Seal	1.00	-.60
12" " " "	1.50	-.90
10" " "Victrola" Red Seal	2.-	1.20
12" " " " "	3.-	1.80
10" "Zamagno" " " "	5.-	3.50
10" "Melba" " " "	3.-	2.10
12" " " " " "	5.-	3.50
12" "Patti" " " "	5.-	3.50

NEEDLES.	LIST PRICES	COST TO DEALERS
Per 100 -.06	per 1000 -.60	per 1000 -.35

Parts and accessories: For prices on Victor Machine Co's Carrying cases, repair parts and miscellaneous supplies, see our current catalogs, Regular Dealers' discount applies.

TERMS: Net 30 days, 2% 10 days. Delivery f.o.b. City, In which distributor is located.

Any dealer desiring to handle Victor Talking Machines records and supplies, and not having previously enjoyed Dealers' discounts on Victor goods, must qualify as a dealer by purchasing at least three Victor machines, of different styles, and one hundred Victor records. In addition the dealer must have an established place of business, suitable to display our goods, and at all times keep on hand sufficient stock for exhibition and sale purposes.

C O N D I T I O N S O F S A L E.

All Victor Talking machines, records, sound-boxes horns, parts and miscellaneous supplies are sold at the company's factory in Camden, N. J., under patents owned and controlled by the V. T. M. Co., as hereinbefore noted, under a restricetd license, under the conditions set forth on the labels attached to the goods, and all sales to dealers and consumers of said patented goods are subject also to conditions noted in this Dealers' contract. The right to the sale and use of said goods is dependant upon the observance of the vendee of all the said conditions. Among numerous other U. S. Patents owned or controlled by the V. Co., under which the said goods are manufactured and sold, are: No. 534,543, issued Feb. 19, 1895, for Gramophone; and No. 548,623, issued Oct. 29th 1895, for Sound-record, to Emile Berliner and No. 814,786 and No. 814,848, issued March 13, 1906, to E. R. Johnson. The numbers and dates of other U. S. Patents will be furnished on request. The conditions of this contract are as follows:

Premiums

Premiums & Trading Stamps.

1. Dealers must not sell or offer for sale, at retail directly or indirectly, any Victor talking machines records or supplies therefor, at less than the licensed retail price. Neither shall any of the regular factory product, as illustrated in the regular catalog of the V.T.M. Co., be given away as premiums, nor shall any other merchandise, trading stamps, negotiable paper or other inducements, be offered with them, as an incentive to promote their sale.

Shop Worn Second-Hand Records.

2. No license or permission is granted for the sale of shop-worn, damaged or second-hand Victor Talking Machines records or supplies at reduced prices and will not be allowed. If, however, the dealer wishes to sell a legitimate second-hand or out-of-date, old style Victor machine and will inform the factory in writing of that intention, together with the serial number of the machine in question, and this number proves the machine to have been sold by the factory a year previously, then a special license, in writing, will be issued by the V. T. M. Co., to that dealer, permitting the sale at a reduced price, if the necessary facts are established to the satisfaction of the V. T. M. Co., A new notice or label bearing the serial number and conditions will then go forward with the permit, which must be affixed to the bottom of the machine, showing at the time of sale, that his machine is second-hand and is licensed to be sold at a reduced price. It is distinctly understood, however, that no such second-hand or out-of-date, or old style machine shall be sold, until all of the provisions are complied with, and until the said new notice or label shall be properly attached to the machine.

Labels.

3: The labels and plates of Victor Talking Machines and Records must not be removed or defaced. Thesell ing of machines and records with these labels, removed or defaced, will constitute an infringement or patents, under which the machines, records, horns, sound-boxes etc., are sold.

Loans or Purchases between Dealers.

4: Authorised Dealers are at liberty to borrow Victor goods from another authorised dealer, if mutually agreeable; but each time, the goods are borrowed, must be replaced by the goods of the same make and style. If an outright sale is to be made from one dealer to another it must be at list-prices, and in no case shall the sale be at dealer's cost.

Export Prohibited.

5: To substantially uphold and maintain certain important agreements made with foreign countries, the discount quoted to dealers applies only to the sale of Victor Talking Machines, records and supplies to users in the U. S. of America. Our dealers must exert all due caution to guard against evasion of this clause. A violation of this clause will constitute a good and sufficient ground for forfeiture of this agreement at the election of the Victor Co.

Absolute Good Faith.

6: Dealers must co-operate in absolute good faith with the V. T. M. Co., and inform them direct of any person or persons, either in their locality, or at a distance, who, not being entitled to them, are enjoying our discounts. Also must they inform us direct of any other dealer, who is not living up to the contract-system. The above co-operation for our mutual good is imperative.

Breach of Contract.

7: All Victor Talking Machines, records, horns, sound-boxes and supplies, as before stated, are covered by U. S. Patents owned and controlled by the V. T. M. Co. and are sold subject to the foregoing mentioned conditions. Upon the breach of any of these conditions, the license to sell or use said Victor Talking Machines, records, sound-boxes, horns and supplies shall cease and terminate immediately, without notice, and the vendee or user of said same becomes at once an infringer of said patents and may be proceeded against for infringement of any of the said patents and for injunction or damages, etc., or both. No variation of these terms and conditions authorized by any employee of the V. T. M. Co., will be valid, unless first ratified in writing by its President or Secretary.

Validity of Patents Admitted

8: The validity of the patents of the V. T. M. Co under which the said goods are manufactured or sold, is hereby expressly admitted, upon the acceptance of the terms of this contract and it is distinctly and expressly understood and provided, that the party accepting the terms of thiscontract, will not, in the event of the breach of the contract, or any termination of the contract, thereafter, contest the validity of any of said patents of the V. T. M. Co., under which the said goods shall have been manufactured or sold.

Method of Terminating Contract

9: The V. T. M. Co shall have the right, and reserves unto itself the right to terminate this contract at any time for cause, or otherwise notice of the termination of said contract to be forwarded by mail in writing by the V. T. M. Co to the last known addressof the party or parties accepting this contract; the said termination and annulment of said contract to take effect at once. It is distinctly understood and agreed, however, that any such termination of this contract shall not relieve the dealer or party operating under this contract, from any liability to the V. T. M. Co., which occured or accrued during the existence of the contract/

Liquidated Damages for Violation

10: In the event of any termination of this contract by reason of the breach of any of the conditions by the party accepting the contract, damages for the same shall be at the election of the V. T. M. Co be estimated at Fifty (50) Dollars, which the party accepting the contract, hereby covenants and agrees to pay as liquidated damages; the V. T. M. Co., may, however, if it so elects and can so establish prove actual damages to a greater amount, and be ebtitled to recover the same.

Voids any Previous Agreement

11. It is understood, that this agreement is to take the place of any prior existing agreement between the parties bearing upon the subject matter as covered in, or provided by, this agreement.

12. Itnis expressly understood, that in the event of any breach of any of the terms or conditions of this agreement by the party accepting the same, the V. T. M. Co in addition to its other rights, may place and publish the name of said party upon its suspended list.

This agreement is personal tothe party accepting the same, and is not transferrable or assignable.

Camden, J. J. Victor Talking Machine Company .

DEALERS' AGREEMENT -- ACCEPTANCE.

In consideration of the right to purchase Victor Talking Machines, parts thereof, records, sound-boxes, horns and supplies from the V. T. M. Co., or their authorized distributors, at the regular dealers' discount provided in the foregoing agreement, for the purpose of vending, in the U. S. of America only, we hereby accept all the terms and conditions provided in the foregoing, and covenant and agree to faithfully perform all of said conditions and terms, and to observe the said list-prices, discounts and terms as well as other prices and terms, that may be established from time to time by the V. T. M. Co., upon such patterns, sizes or styles of their ware, and may be introduced and marketed by them, and to conform to and adhere strictly to and be governed by the same; the right of the V. T. M. Co. at any time and all times to establish or change any such new prices on all its manufactures in the hands of dealers and distributors, as well as on those thereafter to be manufactured or sold by it, being hereby admitted. Itnis distinctly understood, that this agreement grant no exclusive agency or territory, to the undersigned, and that any violation of any of the conditions or terms, mentioned in the foregoing clauses justify the V. T. M. Co., among other things, to at once cut off the supply of goods and place the undersigned upon the suspended list.

Dated July 6th, 1906.

DEFENDANT'S EXHIBIT.

COMPLAINANT'S LETTER #1. U. V. P. B.

VICTOR TALKING MACHINE COMPANY,
Camden, N. J., Sept. 24, 1906.

Dear Sir:

The firm having the exclusive sale of Victor goods in India, writes to us that the James Manufacturing Co., of Bombay, are importing Victor Talking Machines and Records into India and that their agents in New York are Dadabhoy & Co. We give you this information so that you can look out for orders for Victor goods emanating from these people.

Please use special care so that none of these Machines which reach India or other foreign markets can be traced back to you.

Yours very truly,

VICTOR TALKING MACHINE CO.

Export Department.

DEFENDANT'S EXHIBIT #8.

COMPLAINANT'S LETTER. W. V. P. B.

VICTOR TALKING MACHINE COMPANY,
Camden, N. J., Oct. 22, 1906.

(COPY OF THE NOTICE SENT TO ALL VICTOR DISTRIBUTORS)

It is our sincere desire to properly limit the number of Victor Dealers throughout America -- to limit them to the end that Victor goods may receive a more powerful, and enthusiastic representation than ever before.

We wish our present line of Victor Dealers encouraged; we desire new Victor Dealers only in Cities and Towns wherein our interests are not properly taken care of at the present time.

We propose to limit the indiscriminate placing of Victor Dealers so that those now handling our product may never be in fear of some poor representation being placed with some very weak merchant, a barber shop or other undesirable person; hence the following ruling will go into effect on and after this date, viz:

NEW RULING.

OUR DISTRIBUTORS MUST IN EVERY CASE WHEN QUALIFYING A NEW DEALER, AND, BEFORE SHIPMENT OF THE GOODS, SUBMIT TO US HIS CONTRACTS, SIGNED IN TRIPLICATE, TOGETHER WITH STATEMENT OF THE AMOUNT OF HIS INITIAL ORDER. THE DISTRIBUTOR WILL THEN AWAIT AUTHORITY FROM THIS COMPANY TO QUALIFY THE DEALER, WHICH WILL BE PROMPTLY FORTHCOMING IF DESIRABLE, AND THE CONTRACTS AT THAT TIME WILL BE RETURNED; ONE COPY TO THE DISTRIBUTOR, AND ONE DIRECT TO THE DEALER ACCOMPANIED ~~TO THE DISTRIBUTOR, AND ONE DI~~ By his Identification Card.

Full information is tabulated in our offices regarding the status of the Victor representation in each Town, and our judgment as to the desirability of qualifying new

Dealers must be accepted as final.

The above ruling should in no instance cause a delay in shipment of more than a week. Telegraphic authority may be had upon request, and to a Dealer who has delayed putting in the Victor line all these years, this slight final delay can be of no great moment.

Any failure to comply with the above request will be construed as a violation of our contractural relations.

Very truly yours,

VICTOR TALKING MACHINE COMPANY,

Per-Louis F. Geissler.
General Manager.

DEFENDANT'S EXHIBIT.

COMPLAINANT'S LETTER #6. W. V. P. B.

VICTOR TALKING MACHINE COMPANY,
Camden, N. J., Nov. 25, 1908.

TO ALL VICTOR DISTRIBUTORS AND DEALERS -- WARNING.

Dear Sir:

We have noticed certain advertisements and circulars recently put out by the Continental Record Company, of New York City, N. Y., or by Winant V. P. Bradley, of Brooklyn, N. Y., in which they offer to sell certain disc sound records to the trade and public generally, noted in their list or catalogue which records it is stated are "Made in this country from Mother Records imported from foreign countries." One of the circulars which we have seen states, among other things:

"In re Continental Grand Opera Records (Discs only)

I beg to enclose you advance list of high class Grand Opera records, by prominent artists of the world-wide fame at prices averagi aging not more than half those now charged for the original records. The records themselves are pressed up on the very highest class of material finished equal to the original. The character of the record itself is identical with the original record and experts who ~~have~~ have listened to my samples are unable to determine between the original and the copy."

The circular also states that an additional number of 150 of the most popular records now in existence will be ready by the time a reply is received to the letter. It also states that "These records are made in this country from Mothers imported from foreign countries." This letter is dated November 1, 1908, apparently circulated in the trade over the name of Winant V. P. Bradley, Sales Agent.

It is hardly necessary for us to advise you that these records are, as we are advised, infringements of our patents, particularly the adjudicated Berliner Patent, No. 534,543, dated February 19, 1895, and our recent Johnson Patent, No. 896,059, dated August 11, 1908; and further, that these records are, from the list submitted, and from the statement made as to many of them, apparently "dubbed" or copied from our own high class opera records, such for instance, as the Caruso selections, and of other like talent who sing exclusively for the Victor Talking Machine Company.

This of course we regard as a gross infringement not only of our patent rights, but a violation of all the well settled principles of fair dealing, and constitutes unquestionably unfair competition, which doubtless the Courts will suppress as soon as suit is brought.

It is, therefore, our intention, if this infringement is not promptly discontinued, to institute the necessary legal proceedings, and it is necessary for us to suggest to you that all these goods so advertised will in our judgment be liable to injunction, and render, not only the manufacturer, but the dealer and purchaser liable.

We feel convinced of your desire to encourage only fair dealing, and not to handle infringing goods, and trust that our confidence is not mistaken.

Very truly yours,

VICTOR TALKING MACHINE COMPANY,

Louis F. Geissler,
General Manager.

VICTOR TALKING MACHINE COMPANY,
Camden, N. J., Oct. 15th, 1908.

Gentlemen:--

The enclosed announcement is issued to our Distributors - not in the nature of a statement of a new attitude that we have taken towards Distributors, as this has been our position in the matter almost since the inception of the Victor Talking Machine Co.- but rather to reinform such Distributors as may have forgotten our conditions, most all of whom have simply been notified verbally of these conditions at the time they were made a Distributor.

We believe furthermore, that the notice is practically unnecessary, as few, if any, of our Distributors are handling any other disk goods at present, and such as have in the past taken them up through a misconception of our attitude, have cheerfully relinquished them upon request.

However, in order that a perfectly plain understanding may now be had, we wish you to take careful note of the issuance of the enclosed mandate.

We wish to be justified in your eyes in this attitude, and have no doubt but that the statements made by us here will fully justify our position.

Unprecendented sums of money - millions - have been expended in acquiring patents, developing same, building up an adequate plant, and advertising this article so liberally and broadly as to create a demand, from which we are all reaping reasonable results.

Trading and preying upon the popularity of our wares, piratical manufacturers and interlopers have come into the market, with very inferior imitations, as well

as a miserable catalog of selections, the very stocking of which by Jobbers and Dealers has resulted, and will continue to result, in much damage to this Company as well as to cause discouragement and disgust on the part of most of the Dealers who may stock them, on account of their unsalability, and which, if permitted to continue will prove a serious menace to the industry in general.

It is, of course, a serious temptation to a Dealer to have goods - no matter how inferior - offered to him at cut rates, and at such low costs as to invite their being retailed at cut rates.

Our ruling will exert a powerful influence, tending towards the centralizing of the best advertised and most noted Talking Machine Goods into the hands of the present line of Dealers, and force these outsiders to search for and develop new trade in new fields (if they can) instead of preying upon the trade already built up by manufacturers who have, by their advertising and methods of marketing, concentrated the sale and consigned their interests and the entire distribution of their wares, at good and assured profits, into the hands of their present Contracted Distributors and Dealers.

We sincerely hope and believe that our Distributors, after due thought upon this subject, will agree that this condition is a wise one, and instead of being in any wise a restriction of trade, will prove to the advantage of and a potent developer of our young and rapidly expanding industry.

Our aims shall continue to be:-

1st - QUALITY OF OUR GOODS - a quality which will be found, by actual and critical comparison, to be without serious competition in any part of the World.

2nd - A most liberal distribution of profits to our Dealers, and profits that are assured them, under a strict and unswerving business policy, under a contract.

3rd - We shall continue to offer the best catalog, most estensive and comprehensive of any Talking Machine Company in the World. We are prepared by our Impresarial, Operatic and Musical connections, as well as financial ability, to secure and retain the World's greatest Artists for your records.

4th - "His Master's Voice" - probably to-day the best known trademark in the World, shall be doubly so well known within a short time. Our Advertising Campaign and expenditures shall be quadrupled by ways, methods and influences that shall prove absolutely unique in our trade. Our Competitors will be absolutely unable "to go the pace".

5th - It shall remain our policy to take care of the interests of Victor Distributors and Dealers, and to make such moves as will best permanently conserve their interests, to the end that they shall feel at alltimes, a confidence in this Company and its wares, which will win their exclusive allegiance and hearty co-operation.

Very Respectfully,

VICTOR TALKING MACHINE COMPANY,

Louis F. Geissler,
General Manager.

IN THE CIRCUIT COURT OF THE UNITED STATES

For the Eastern District of New York.

FONOTIPIA LIMITED AND THE COLUMBIA PHONOGRAPH COMPANY (GENERAL)

vs.

WINANT V. P. BRADLEY.

In Equity, Docket No.

On Patent No.

COMPLAINANTS' BRIEF IN REPLY.

PHILIP MAURO,
C. A. L. MASSIE,
Of Counsel for Complainants,
Tribune Building, 154 Nassau Street, New York City.

To Ralph L. Scott, *Esq.*,
Solicitor for Complainants,
154 Nassau St., N. Y. City.

Due and timely service of a copy of the within

.....is hereby admitted

this.....day of....., 190....

.....

.....

C. G. Burgoyne Walker and Centre Streets, New York.

.....years of age and upwards; that on the.....day of....., 190...., between the hours

of.....M. and.....M., at.....in the.....

of.....he served the within.....

upon.....by exhibiting the within original to.....

.....and delivering to and leaving with.....a true copy thereof.

Sworn to before me this.....

day of....., 190....

.....

Notary Public.

INDEX.

IN THE CIRCUIT COURT OF THE UNITED STATES
For the Eastern District of New York.

FONOTIPIA LIMITED AND THE
COLUMBIA PHONOGRAPH COMPANY
(GENERAL)

vs. In Equity.

WINANT V. P. BRADLEY.

COMPLAINANTS' BRIEF IN REPLY.

PRELIMINARY: AFFIDAVITS AND BRIEFS.

This matter is of such great importance that we would not have its outcome affected by trivial matters of form or procedure that may be readily disposed of.

And first, with regard to the service and exchange of papers: This Court originally directed defendant to serve us with his answering affidavits three days before the date set for the hearing. Defendant obtained a modification of this disposition, and a week's adjournment; but the Court, at the original hearing (Feb. 13), directed defendant to give complainant his papers in advance of the hearing set for Feb. 20, 1909. Complainants' counsel received defendant's Bradley affidavit just before leaving his office to come to Court on Feb. 20, and did not have an opportunity to consider the same (except superficially) until after the oral argument on that date. The Court granted complainants permission to reply to said affidavit.

At said hearing, although defendant had then had practically 15 days possession of complainants'

moving papers, defendant's brief was not ready; nevertheless, at that time we gave defendant's counsel a copy of complainants' brief. And the Court granted us leave to reply to defendant's brief, which defendant was directed to serve on us by March 2nd, (nothing being said as to any additional affidavits by defendant); and complainants were granted leave to produce their answering affidavits and reply brief at the hearing set for the afternoon of March 4, 1909.

On opening our office at 9 o'clock on March 3, 1909, we found two papers, and shortly thereafter there was delivered to us a third paper from defendant's counsel. These papers comprise not only defendant's briefs in this and in the Victor case, but likewise a long affidavit by Mr. Bradley (originally verified in the Victor case and introduced into this case by a short affidavit).

In reply to certain allegations in the original Bradley affidavit of Feb. 20 (served on us that morning), and in the last-named Bradley affidavit of March 2 (served on us on March 3), we submit the Cromelin affidavit in reply and the Lyle affidavit. And in reply to defendant's briefs we submit the present brief.

AS TO FACTS.

The facts alleged by complainants in this case are admitted, save in a few instances. There is no dispute as to any material fact. Defendant Bradley undertakes to make certain assertions regarding the payment of royalties to our artists by the co-complainants, - in which he is mistaken (Cromelin affidavit in reply, p. 1).

Defendant is underselling us. See defendant's advertisement of Nov. 1, 1908, appearing in the Victor Company suit (immediately following Bill of Complaint); see also Cromelin affidavit in reply, paragraph III.

Defendant Bradley asserts on page 8 of his first affidavit (verified Feb. 19), and on page 5 of his affidavit of March 2 (verified in the Victor Co. suit but introduced herein), that the complainant Columbia Company has duplicated or "dubbed" disc sound-records put out by others, and that he is informed that disc records made and sold in Europe are "imported into this country and copied by the Columbia Phonograph Company". Mr. Bradley is manifestly not in a position to know anything about this matter. And his statements are absolutely untrue. See Lyle affidavit.

There is a dispute as to where defendant obtained our records which he has been counterfeiting. We believe the evidence shows he got them (or some of them) in this country. One of defendant's catalogues asserts that they were procured in foreign countries; but in his affidavits defendant does not make this assertion positively and unequivocally, nor does he show that he himself has any knowledge on the subject. He merely says first on page 8 of his first affidavit that "such foreign made records, fully furnished and commercially sold, have been copied by the Continental Record Company, a corporation". It might be true that the Continental Record Company has obtained some records in a foreign country and has duplicated or copied them here; but it does not follow that the particular Continental Records which we are complaining of (as having been counterfeited from our Columbia Fonotipia records) were obtained in

the manner indicated. The "such foreign made records" in Mr.Bradley's affidavit refers to the Fonotipia Records, which the Lyle affidavit shows have not been imported into this country. And it is to be noted that Bradley does not state that he knows of his own knowledge how the Continental Company obtained its records.

Mr. Bradley next says (on the last page of the same affidavit) that he has always stated to his customers that the records he sells "are duplicated from records purchased from others in foreign countries". What Bradley may have stated to his customers is incompetent and immaterial. As already noted it does not appear that Bradley has any knowledge on the subject.

As to these matters we will show later that it is immaterial where defendant got possession of our commercial records which he has copied. But at this time we will show that he has copied records put out in this country: the Cromelin affidavit in reply shows that the matrices which are sent to this country by the Fonotipia Company do not come already paired off, but that Mr. Cromelin himself determines which two matrices shall be selected and coupled together, that the pairing off is done here, and that our Columbia records are not exported nor are the Fonotipia records imported. The facts regarding the "Alfred Song" and the "Purse Scene" show, conclusively to us, that an identical specimen of that particular double-faced record was obtained in this country by defendant, and used by him for the purpose of making his counterfeit record No. 676.

We have stated this matter is immaterial, but we have dwelt on it because it is VERY SIGNIFICANT. If defendant has, as he alleges, a perfect right to counterfeit our records, why does he think it necessary to send to Europe - or assert that he sends to Europe - to purchase our records for that purpose, when he can get the same records right here in this country? The fact that he does so - or that he thinks it necessary to assert that he does so - indicates the clandestine nature of his actions; and indicates that he has all along known full well of complainants' claims in the premises, and cannot plead that he has been acting bona fide and in ignorance.

If we are correct in our view of the law - viz: that equity will enjoin a defendant from diverting to himself, by unfair means, the business of another, to the great damage and injury of that other- then it is immaterial whether the instrumentality or means by which the defendant achieves his purpose be obtained in this country or in some foreign country. It is as immaterial as the question whether the metal for defendant's press was obtained from the iron mines of Missouri or came from Sweden; or whether the material in defendant's Continental Records was obtained from the Asphalt Lakes of Trinidad, or was compounded in Brooklyn from the refuse of some Sugar Refinery.

OTHER FORMAL MATTERS.

Defendant asserts (1) that the artists are proper parties to this suit, so that presumptively their absence is fatal; (2) that the contract between the two complainants, and the contracts between the Fonotipia Co. and the respective artists, should be produced; and

(3) that such contracts - as likewise the fact that we and the Victor Co. are acting in harmony (in bringing the two companion suits against defendant) - are "in restraint of trade", and therefore illegal, and, therefore, presumptively are a bar to the relief asked. The first two matters are purely formal. We assert that the artists are not necessary parties, and that the contracts need not be set out; but, if we are mistaken in these points, such omissions can be readily cured at any time by proper amendment. But, in the meantime, this Court of Equity will grant the preliminary relief that the exigencies of the cause demand.

See Chester Forging & Engineering Co. vs. Tindel-Morris Co., (Court of Appeals for the Third Circuit), 165 F. R., 899.

For the present it is sufficient to say that if the artists are "proper" parties, they are not "necessary parties", still less are they "indispensable parties", under the distinctions made by the Supreme Court; and the rights of the artists are and will be amply protected under our bill as framed, - because the artists are to be paid their royalties upon each and every disc record made.

As tothe contracts between the two complainants and between the Fonotipia Limited and the artists: we are not seeking to enforce any such contract as against a party thereto; therefore it is not necessary to set out the contracts. We are seeking to protect a legitimate business existing within the United States, to which the contracts are merely an incident; and it is no more pertinent to require the production of those contracts

than it would be pertinent to require the proprietor of an establishment, when suing a man for trespass, to produce his title deeds to the property. To give further time to this and similar suggestions by defendant, is to lose sight of the main issue involved, viz: the power of a court of equity to enjoin the defendant from destroying a legitimate business by diverting the same to himself by unfair means.

CONTRACTS IN RESTRAINT OF TRADE.

Defendant urges that complainants' various contracts with each other and with the artists, and complainants' agreement and understanding with the Victor Company, amount to contracts "in restraint of trade"; and, therefore, we are asked to conclude that this justifies defendant in his trespass.

The contracts are not in restraint of trade, and defendant has mistaken the law. A recital (with some modofications) of an actual incident happening to the writer of this brief, illustrates our point. Complainants' counsel has a small suburban property in New Jersey. At the rear he planted a little garden which he enclosed with a wire fence. His next door neighbor did the same thing, their gardens adjoining. One morning he found that some denizen of the neighborhood had broken through the fence and trampled down and destroyed many plants, besides purloining a number of vegetables; and the writer soon observed that the same thing had been done to his neighbor's garden. Thereupon he informed his neighbor of the fact and the two went together to lodge a complaint

with the authorities against the offender. When the culprit was arrested he admitted the charges; but he asserted first that we had not produced and exhibited our title deeds; moreover, he asserted, our properties were mortgaged, and we had not produced the mortgages; and especially, he said, our fencing in of our gardens was "in restraint of trade", since it interfered with his "cutting across lots"; and, above all, our appearing together to lodge the complaint was "a conspiracy". Our charges against him were true enough, he said, but he argued that for the reasons stated we could have no relief. It is needless to say a stern "injunction" was uttered, and since then our gardens have been unmolested.

But the agreement between the two complainants - a British contract - is not illegal, as will be seen by referring to the bill of complaint. Nor is any contract between the Fonotipia and our artists an illegal contract; such contracts have repeatedly been approved by the Courts (witness the Metropolitan and the Manhattan Grand Opera contracts, the contracts between actors and managers, &c., &c.). Nor is our understanding and agreement with the Victor Company illegal. That contract met the approval of Judge TOWNSEND, sitting in the U. S. Circuit Court for the Southern District of New York (146 F. R. 534, 539), ~~and~~ affirmed by the Court of Appeals (148 F.R. 1022).

In the next place, the contracts here in question relate to patented articles (see page 1 of the first Massie Affidavit, Jan. 30, 1909). Therefore, the contracts do not fall within the inhibition of any anti-trust laws, State or Federal, nor of the common law.

Bement vs. National Harrow Co., 186 U.S., 70.

-8-

In the third place, if our contracts, or any of them, were illegal because "in restraint of trade", such contract may not be attacked collaterally; and the illegality may not be set up as a defense unless the suit is to enforce the illegal contract. The remedy is an action by the Attorney General (Bement vs. National Harrow Co., 186 U.S., 70, 87-88), of which character were such authoritative decisions as are cited in defendant's brief. But a stranger to such contracts cannot defend an action ex contractu (not based on such contracts) by setting up the illegality of the contracts; still less can a tort-feasor justify by the alleged illegality of contracts.

Continental Wall Paper Co., v. Louis Voight &c., 148 F.R., 939; 78 C.C.A., 567; 204 U.S., 673.

Connolly v. Union Sewer Pipe Co., 184 U.S., 540.

Lafayette Bridge Co. v. City of Streator, 105 F.R., 729.

Harrison v. Glucose Co., 116 F.R., 304; 56 C.C.A 484.

Scribner v. Straus, 130 F.R. 389 (Judge LACOMBE).

Rubber Tire Wheel Co. vs. Milwaukee Rubber Works, 154 Fed. Rep., 358.

ON THE MERITS.

Having briefly replied to the various trifling matters which defendant has sought to thrust forward to obscure the real issue, - the real controversy comes down to this: (1) complainants, at great expense and by their own industry, have created and are maintaining here in this country a legitimate and very valuable business in making and disseminating sound-records of high quality;

(2) the defendant is obtaining the benefit of that business, at a trifling expense to himself, and is thereby destroying complainants' business; and defendant is accomplishing this by unfair means. Has a Court of Equity the power to enjoin the defendant if there is no "palming off"?

Complainants are handicapped by having to pay the royalties to the artists; whereas defendant does not have this burden. Complainants are further handicapped by having to maintain expensive laboratories and high-priced experts; and this burden also defendant does not have. The competition is not on even terms: it is not "fair".

Defendant is seeking to get for nothing what complainants are required to pay for, and to institute a destructive competition . . . . which tends to destroy . . . . and to injure the complainants' business; and he thereby appropriates to himself the complainants' legitimate business".

Sperry & Hutchinson v. Mechaniss Clothing Co., 128 F.R., 800, on p. 835.

We do not believe that any further argument is needed to point out the "unfairness" of defendant's conduct; so that the sole question is whether a Court of Equity has power to protect us and to enjoin the defendant.

We reiterate the contention made orally and in our former bruef, and insist that a Court of Equity has power to enjoin and will enjoin a defendant from thus injuring a complainant's business, even when the injury is accomplished by other means than "palming off". We

refer to the cases cited in our former brief and in Mr. Pettit's brief for the Victor Company.

DEFENDANT'S CONTENTIONS.

As we understand defendant's contentions on the merits, he asserts (1) that complainants have no status because they have been guilty of entering into illegal contracts - which we have disposed of; (2) that complainants are without remedy because we do not and cannot invoke the copyright law or the patent law; and (3) that we are without remedy because the law of unfair competition is limited to the enjoining of imitation of dress and appearance - "palming off".

In reply: we submit that the unfairness of defendant's competition is manifest; and the very fact that the patent laws and copyright laws donot afford a remedy is all the more reason why a Court of Equity (if it has the power) should right the wrong. The copyright laws cannot be invoked because they do not apply to sound-records (White-Smith Co. v. Apollo Music Co., 209 U.S. 1). The patent laws do not apply because our Patent is for a "process", which has been adjudged not to be infringed by actions performed abroad; and the wrong and injury is the same - patent or no patent.

So that the ultimate inquiry is, as noted, the single question as to the power of this Court: If the law of "unfair competition" is limited to cases of "palming off", then we are without redress, and must suffer this branch of our business to be destroyed, while defendant waxes rich on his piracy. If the doctrine of unfair competition is not limited to "palming off", -

then this Court will grant the injunction, and will at this time grant preliminary injunction, since there is no dispute as to the material facts.

And, finally, defendant contends that because, in the case of a picture, he can copy it with impunity if there be no copyright, therefore he can with equal impunity copy our sound-records. While it is true that the copying of ~~kkm~~ an uncopyrighted picture is not illegal, yet we believe that under facts corresponding to those at bar, equity would grant relief. We mean, if one should prepare and collect, at great expense, a great number of artistic pictures, and should build up a large and valuable business in disseminating such pictures, then - although the copying of any one of those pictures would not be illegal - yet we believe that if the defendant made a regular practice of copying all of those pictures and offering them for sale to the public at reduced rates, thereby destroying the legitimate business of the originator, he would be enjoined. As an illustration: any citizen is at perfect liberty to wander at will on the public streets of this city; and in doing so, he must needs be following other individuals. But if he makes a practice of following some one individual, to the annoyance of his victim, his action becomes illegal (as in case of private detectives etc.).

Moreover, even in the case of an uncopyrighted picture, one who has obtained a view of the picture under confidential relations, will be enjoined from copying it. So also, one who has obtained any confidential knowledge (as of trade secrets, lists of customers, etc.), will be enjoined from making use of it. And, finally, any

limited publication - that is, disclosure for certain purposes only - does not justify the person thus obtaining knowledge, in making unlimited use of the information. This principle applies to the case at bar: The singers execute the original sound-records for the express purpose of having them put out and sold by the complainants, who are to reimburse the singers; the complainants distribute the sound-records for the express purpose of having them used upon talking-machines, and expressly in return for the purchase price. Any other or additional use of our sound-records, for which use the purchaser has not paid, and which use destroys our business, is equally unauthorized and equally unlawful.

What we complain of is not the copying of any one particular sound-record, but the practice - the wholesale practice - of copying our records and thereby destroying our business. The offense which we seek to enjoin is the unlawful destruction of our business; the copying of the records is merely the "means" by which the offense is consummated.

CONCLUSION.

The whole matter boils down to the single inquiry: Can a Court of Equity enjoin a defendant from destroying a legitimate business by unfair means, if there be no "palming off"? Is "palming off" the only unfair action which a Court of Equity has the power to enjoin?

In the STOCK TICKER CASES, the injury complained of was not the violation of a confidence—because any loafer on the streets could drop into the bar room or hotel lobby where a ticker was established, and there

read and make full use of the information found on the tape. The wrong consisted of defendant's destruction of complainants' business, and the reading of the tape was merely the means by which the wrong was accomplished. The Courts enjoined the use of "unfair means" which did not consist of "palming off".

In the RAILROAD SCALPERS CASES, the wrong complained of was not the inducing the original purchaser to "violate his contract" with the Railroad; the Courts noted that an action at law could be brought on the contract printed on the ticket, and that the Railroad could likewise hold the ticket forfeited; yet the decisions were that, notwithstanding these remedies, the suits were properly brought to enjoin the defendants from destroying that branch of the Railroad's business. That was not a "palming off", yet the Courts had power to enjoin it, and did enjoin it.

So, also, in the TRADING-STAMP CASES, the fact that the stamps were not property but were merely "tokens", is not material: the cases did not turn on that point. The defendants were adjudged to have a perfect right to buy the trading-stamps from regular customers, or to collect them from the merchant-subscribers; and the defendants could then use the trading-stamps by having them redeemed. The wrong did not consist of buying up trading-stamps, but of destroying complainant's legitimate business; and defendants' acquisition and use of the trading-stamps was merely the means by which the wrong was accomplished. And this "means" was not a "palming off"; nevertheless it was enjoined.

Finally, the French decision, Columbia v. Duval, annexed to Mr. Pettit's papers, and the recent German decision (Gramophone Co. v. ----------) mentioned in the first Cromelin affidavit herein, while not binding upon this Court, yet, like other foreign decisions, "are very persuasive as indicating how, in case of doubt, the case may with propriety be decided". Moreover, the question here at issue is not dependent upon any statute, but upon the well recognized and logically erected jurisprudence of "unfair competition", which is recognized and enforced in the tribunals of all progressive countries.

Therefore, since the facts are not in dispute, and since we have demonstrated what the law is, we respectfully demand the preliminary injunction to which we are entitled.

Respectfully submitted,

Philip Mauro

~~PHILIP MAURO,~~

~~C. A. L. MASSIE.~~

C.A.L. Massie.

Of Counsel for Complts.

Dated New York City,
March 4, 1909.

C. A. L. MASSIE
RALPH LANE SCOTT

MAURO, CAMERON, LEWIS & MASSIE
620 F ST., WASHINGTON, D. C.
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NEW YORK March 13, 1909.

Hon. Thomas I. Chatfield,
United States Judge,
Post Office Building,
Brooklyn, N.Y.

My Dear Judge Chatfield:-

FONOTIPIA LIMITED AND THE COLUMBIA PHONOGRAPH COMPANY (GENERAL) vs. WINANT V. P. BRADLEY.

I beg to hand you herewith a copy of the new Copyright Bill, passed and approved on the last day of the session.

As complainants' counsel understands the situation, your Honor desires to be satisfied, first, that the new Copyright Act does not shut out our present Bill of Complaint, by granting some exclusive remedy that is applicable to the present controversy; and, second, that the new Act does not in any way grant immunity to the defendant.

An examination of the enclosed Act shows beyond peradventure that it has no effect whatever upon the litigation under consideration.

First: The Act does not go into effect until the first of next July. See §64, on p. 15. Consequently, it is not now effective in any manner.

Second: The Act will not affect any right of action now existing. See §63, on p. 15. For this reason also, the Act does not affect our present litigation.

Third: Under the Proviso of sub-section "(e)", on page 1, sound-records for talking-machines (and other "parts of instruments serving to reproduce mechanically

the musical work") are expressly excluded from the operation of the new Law, - except for "compositions published and copyrighted after this Act goes into effect", to wit, next July. Inasmuch as the Grand Opera selections with which our present litigation deals, have already been published (and presumably already copyrighted) - and since they cannot be copyrighted hereafter, having already been published, - this Proviso also expressly excludes our present litigation from the application of the Act.

Fourth: In the same sub-section, foreign authors and composers are expressly excluded from the benefit of the Act, with regard to sound-records, etc., unless the country of which such foreign composer is a citizen or subject grants similar rights to our citizens. The existence of such "reciprocal conditions" will be determined by Presidential proclamation (page 3, end of §7); and at the present time there is no foreign country which grants such rights either to its own citizens or to citizens of the United States. Therefore, foreign composers are completely excluded from this provision of the Act. Consequently, since the musical selections involved in the present litigation are by foreign composers ("Grand Opera Selections"), the entire subject-matter of this suit is foreign to the new Copyright Act.

Fifth: And this reason might be assigned as the principal one: The Act relates solely to the rights, and remedies, of the copyright-owner (author or composer, or

proprietor of the copyright). The Act does not relate, and does not pretend to relate, to any act of "unfair competition." For example, if, after the Act becomes effective, the Columbia Company should (under the provisions found on pages 1 and 2 of the printed copy) engage in producing sound-records of future musical compositions copyrighted by citizens of the United States, paying royalty of two cents apiece thereon, and if the defendant Bradley should then engage in the business of making counterfeit copies of such Columbia records, - in that event he would not only be infringing a copyright, but he would also be inflicting injury upon the Columbia Company. The copyright-owner would have his remedy under the new Act; the Columbia Company would have its remedy under a Bill such as the present one.

In conclusion, the Act relates solely to the rights of the proprietor of a copyright and his remedies, and does not purport to deal with any other question. The Act will not become effective until next July. The Act cannot affect any existing litigation, or any litigation for cause of action already existing. The Act does not apply to sound-records, except (a) where the musical composition shall have been published and copyrighted after July, 1909, and (b) where, in effect, and for all present purposes, the composer is a citizen of the United States.

For each of these reasons, it is clear that the Act is in no way whatever pertinent to the present litigation.

Very respectfully yours, Chas. L. Massie,

CM-H

Of Counsel for Complainants.

P.S. A copy of this letter and of the enclosed printed Bill is mailed to our adversary, Waldo G. Morse, Esq.

C. A. L. MASSIE
RALPH LANE SCOTT

MAURO, CAMERON, LEWIS & MASSIE
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NEW YORK March 25, 1909.

J-1

Hon. Thomas I. Chatfield, U. S. Judge,
Post Office Building,
Brooklyn, N. Y.

My dear Sir:-

FONOTIPIA LIMITED AND COLUMBIA PHONOGRAPH COMPANY (GENERAL) vs. WINANT V. P. BRADLEY.

At the first oral argument before your Honor defendant's counsel, Mr. Morse, raised the point that the authorization of Mr. Maxwell to execute the bill on behalf of Fonotipia Limited, did not sufficiently appear. In response complainants' counsel took the ground that, in the first place, a bill of complaint does not have to be signed by the complainant, but only by counsel; in the second place, no one except the party named as complainant can question counsel's authority to bring the bill in his name, least of all a defendant; but that, in the third place, in order to avoid any hitch hereafter, complainants' counsel would procure properly executed authorization.

Defendant's counsel then stated that, in view of this assurance, he would not press the point.

I beg to hand herewith to your Honor, in compliance with my undertaking, a duly legalized authorization, authorizing and ratifying Mr. Maxwell's action in instituting and maintaining this suit in the name of the Fonotipia Limited.

CM-J Respectfully, C. A. L. Massie

A copy of this letter is mailed to Mr. Morse.

IN THE CIRCUIT COURT OF THE UNITED STATES
For the Eastern District of New York.

FONOTIPIA LIMITED AND THE
COLUMBIA PHONOGRAPH COMPANY
(GENERAL)

vs. In Equity.

WINANT V. P. BRADLEY.

COMPLAINANTS' ACCEPTANCE OF OFFER TO GO TO FINAL HEARING UPON PLEADINGS AND AFFIDAVITS.

WHEREAS, at an oral hearing herein, and upon the suggestion and invitation of the Court itself, defendant's counsel undertook, since there seemed no dispute between the parties hereto as to the material facts presented by the affidavits herein, to put in, as defendant's pleading, an Answer, which should contain no new matter, and made the proposition that this Court should dispose of this cause upon the Bill of Complaint and such Answer and upon the affidavits already on file, as upon final hearing; and

WHEREAS, on or about March 10, 1909, there was filed herein the "Answer of the defendant Winant V. P. Bradley"; and on the same date defendant's counsel in a letter to this Court (Hon. Thomas I. Chatfield) repeated said offer; and

WHEREAS, paragraph "IX" of said Answer consists of "new matter" not found in defendant's affidavits above mentioned, to wit: certain allegations that the Columbia Phonograph Company (General), one of the complainants

herein, is a party to certain alleged illegal contracts in restraint of trade, relating to certain so-called "restricted trade agreements" with its customers and dealers ("Distributors, Jobbers and Dealers") etc., - which allegations are "impertinent"in law and may not be pleaded in defense; and against which Exceptions for Impertinence should properly be filed; and

WHEREAS complainants', accepting the principle of said suggestion by the Court and xx said offer by defendant, but hereby noting their exception to said paragraph "13" of said Answer as impertinent, yet have this day filed their Replication to said Answer; -

NOW, THEREFORE, to whom it may concern, be it known, that the above-named complainants, by C. A. L. MASSIE, ESQ., their counsel, do hereby accede to and accept said suggestion and offer, and do hereby agree that this Honorable Court may determine and dispose of all the matters here in issue, upon the Bill of Complaint, Answer, and Replication aforesaid, together with the below-named affidavits on behalf of complainants and defendant respectively, which were verified in 1909 upon the dates indicated below, together with the exhibits therein identified, viz: Sause (Jan. 22), Fernandes (Jan. 30), first Cromelin (Jan. 28), first Massie (Jan. 30), Anderson & Cromelin (Feb. 4), Carreno (Feb. 4), Forbush (Feb. 16), Emerson (Feb. 16), second Massie (Feb. 18), Cromelin in reply (March 3), and Lyle (March 3), - all on behalf of complainants; and Mrs. Bradley (Feb. 8), first Bradley (Feb. 19), and second Bradley (March 2), having annexed

thereto defendant Bradley's affidavit verified in the co-pending suit against him by the Victor Company (March 2).

Dated New York City, March 15, 1909.

FONOTIPIA LIMITED AND THE
COLUMBIA PHONOGRAPH COMPANY
(GENERAL)

by

C.A.L. HASSIE,
Of Counsel.

IN THE CIRCUIT COURT OF THE UNITED STATES
For the Eastern District of New York.

FONOTIPIA LIMITED AND THE
COLUMBIA PHONOGRAPH COMPANY
(GENERAL)

vs. In Equity.

WINANT V. P. BRADLEY.

COMPLAINANTS' MEMORANDUM IN REPLY TO
DEFENDANT'S MEMORANDUM SUR NEW COPYRIGHT
LAW, ETC.

Counsel for complainants has received a copy of defendant's memorandum of March 15, 1909.

We repeat that our present case is not founded on the copyright laws; complainants are not claiming any copyright in the subject-matter of this suit, and are not charging infringement of any copyright.

And the present suit is not a caseof "imitation" or "palming off".

For these two reasons defendant's latest memorandum is not pertinent.

Defendant's memorandum assumes that every different "rendition" of an old song, which is already in the public domain, may be copyrighted. There is nothing in the Act to justify this. But it is immaterial if true.

Should Madame Eames sing "The Last Rose of Summer", for instance, "with variations", and should she then be permitted to copyright the same (as suggested by defendant's brief), then if defendant Bradley should undertake to make an original recording of that copyrighted song, in order to obtain a plurality of disc sound-records

therefrom, - the controversy would be between him and Madame Eames, under the copyright law. But these complainants would not be affected by it one way or the other. But, should the defendant make a practice of counterfeiting our records (whether they were records of a copyrighted song or not), thereby availing himself of our original and creative work in producing the original sound-records, and thereby injuring our business, he would have to answer to us for his wrong, but not under the copyright laws.

In short, the question of copyright cuts no figure whatever in the present action. Therefore, there is no pertinence in defendant's contention that because Congress has legislated with respect to copyrights, the remedies provided by that Act are exclusive of all other remedies relating to copyrights. It would be little less pertinent to argue that because Congress has legislated with respect to Post Offices and the carrying of the mails, therefore such legislation is exclusive of any other rights in the premises, and consequently we may not maintain this present action for "unfair competition"!

Defendant's discussion of the "Bottle Cases" and of the Globe Wernicke case is not pertinent. They were cases that expressly charged "imitation". In this case we do not charge "imitation". So far as the present case is concerned we do not claim the monopoly of the use of a disc, nor the monopoly of the black color or of any other ocular feature. It seems scarcely necessary to repeat that we charge "unfair competition" in that defendant, by

unfair means, is injuring and destroying our business for his own profit; and that such course of conduct will not be tolerated by a Court of Equity.

Respectfully submitted,

Dated New York City,
March 17, 1909.

Philip Mauro
Calmasie,

Of Counsel for Complainants.

A copy of this Reply Memorandum has been handed to Mr. Morse.

IN THE CIRCUIT COURT OF THE UNITED STATES
For the Eastern District of New York.

FONOTIPIA LIMITED and
THE COLUMBIA PHONOGRAPH
COMPANY (GENERAL)

vs. In Equity.

WINANT V. P. BRADLEY.

REPLY TO DEFENDANT'S "REFERENCES TO NIMS".

We have received a copy of defendant's Brief of May 19, 1909. We do not quite perceive defendant's purpose in preparing and submitting that brief. But it is significant as showing that defendant's learned counsel appreciates the strength and pertinence of the Stock Ticker Cases, the Ticket Scalping Cases, the Trading Stamp Cases discussed in our original brief; and it voices his despair in calling on "NIMS, U.B.C." (which we may be pardoned for saying suggests Mr. BINNS' "C.Q.D.", - a Cry for Help!)

As we understand defendant's brief, he regards Mr. Nims as radical and progressive, the proper subject of "destructive analysis"; but, in opinion of defendant's counsel, even Mr. Nims has not yet had occasion to express his views upon so unique a state of facts as here presented; ergo, defendant may go scot free. A "non sequitur".

There is one single broad ground underlying the Stock Ticker Cases, the Ticket Scalping Cases, the Trading Stamp Cases, and also the case at bar, viz: in each case the complainant had a legitimate and valuable property-right, and in each case the defendant by unlawful means (other than "simulation") was preying on and destroying that property-right to his own benefit. In the Stock Ticker Cases, the property-right was the right of the

complainant therein to control the dissemination of the news gathered by it - in the Ticket Scalping Cases, the property-right was the right to establish and maintain the system of excursion rates - in the Trading Stamp Cases, the property-right was the right to enjoy the system of advertising, etc. - in the case at bar, the propety-right is the right to enjoy the results of the special, unique, and non-replaceable services rendered by our artists and experts. There is no "simulation", "imitation", or "deception of the public" in the cited cases, any more than in the case at bar.

The rule established by those three lines of cases, which we invoke here, is that a Court of Equity has power to enjoin other forms of unfair competition than mere "simulation", "deception of the public" etc.

More particularly, in the Stock Ticker Cases the defendant was not a customer of the complainant, so that defendant could not be charged with "breach of trust"; nor did the customer commit any breach of trust: the defendant would enter the hotels, bar rooms, etc. of complainant's various customers, along with the rest of the public, and there read off the "ticker quotations" as he and the rest of the public were invited to do. The wrong there, as in the case at bar, consisted in unfairly diverting to defendant the legitimate business of complainant, to the injury and destruction of that business. In that case defendant was obtaining for himself, without paying for it, the benefit of complainant's expenditures in gathering and disseminating the news; similarly, in the case at bar, the defendant is obtaining for himself, without paying for it, the benefit of complainant's

expenditures in creating and advertising and introducing to the public the specially-executed selections of Grand Opera etc. The parallel is striking.

In the Ticket Scalping Cases it was distinctly held that the right of maintaining the suit depended not so much upon the wrongful use by defendant of any particular ticket (for which an ordinary action at law might lie); but the Courts pointed out that the property-right involved was the complainant's general plan or scheme of utilizing excursion rates; and accordingly relief was granted co-extensive with that broad right. The injunction of the Courts was extended to protect the Railroad Company's plan or scheme as an entirety. We invoke here a similar broad protection.

In the same way, in the Trading Stamp Cases, the gravamen was not the misuse by defendant of any particular strip of printed paper, but it was the piracy of complainant's advertising business, a valuable property-right. And that is the doctrine we invoke here against defendant's priacy by unfair means of our Grand Opera Record business.

LACK OF PRECEDENT.

As noted, the point of defendant's brief is that so radical and daring and unsound a writer as Mr. Nims has not pointed out any "precedent". What of it? Had defendant's counsel adorned the bar a few centuries ago, when there first came before the Courts of the Mother Country cases of the kind that have since become known as "TRADE MARK CASES" he could with propriety have made the same plea, viz: there was no precedent. He would no doubt have said for the defendant:

"There is no common law that we have violated. Plaintiff can point out no Act of Parliament that forbids what we are doing. We have not taken any tangible property of plaintiff", etc. etc.

And, if in the Court of Chancery, the learned counsel on the same grounds would have argued that the Chancellor had no power to enjoin his client. Nevertheless, as we all know, the doctrine of trade-marks rights has become so completely established that Courts of Equity are constantly granting injunctions in their defense.

Again, had the learned counsel been in practice a short generation ago, when the Courts of this country and of England first had before them cases involving what is now known as "UNFAIR COMPETITION" (where there is no technical "trade-mark"), the same argument would be equally appropriate. Defendant's counsel would have insisted, and correctly:

"We have not violated any Statute. We have not infringed any Patent. Plaintiff has no Trade-mark. There can be no Copyright. There is No Precedent whatever! How on earth, then, can he expect to enjoin us?"

But the Courts perceived that as our "civilization" advances, new kinds of property-rights are constantly coming into existence, and with them are developed new methods of inflicting injury upon property-rights. And the Courts of Equity recognized the purpose of our system of Government in arming them with the power to grant injunctions for the protection of property-rights of whatever nature. And, with that elasticity of application, which

has been so often commended, the Chancellors in this country and in England did not hesitate to exercise those injunctive powers. They said to the defendants: You shall not divert to yourselves the property of another. They applied the old writ of injunction to the new state of facts which called for injunction. They created precedent. And to-day our Courts, as a matter of course, are granting injunctions against "unfair competition", - a thing never dreamed of two generations ago.

Defendant says No Precedent. It is scarcely conceivable that such a state of facts as here shown could have arisen except within very recent years. It is not surprising, therefore, that therehas been no precedent for the precise case here at bar. And that is immaterial. This Court has ample power. Moreover, we confidently urge that the Stock Ticker Cases, the Ticket Scalping Cases, and the Trading Stamp Cases are ample precedent, - if any precedent be needed for a Court of Equity to extend its protection to an established and legitimate property-right when threatened with destruction by unlawful means.

Dated New York City,
May 21, 1909.

Respectfully submitted,

Philip Mauro
C. A. L. Massie,

~~PHILIP MAURO,~~
~~C. A. L. MASSIE,~~

Of Counsel for Complainants.

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19

s, etc.,

Attorney for

United States CIRCUIT **Court**

Eastern *Dist. of* New York.

FONOTIPIA LIMITED and
COLUMBIA PHONOGRAPH COMPANY
(General)

-vs-

WILLIAM V. P. MADDEN.

Memorandum of Defendant on
Settlement of Decree.

WALDO G. MORSE,
Solicitor *Attorney for* Defendant,
Office and Post Office Address,
No. 10 WALL STREET,
New York, N. Y.

IN THE CIRCUIT COURT OF THE UNITED STATES

For the Eastern District of New York.

FONOTIPIA LIMITED and THE
COLUMBIA PHONOGRAPH COMPANY
(GENERAL)

In Equity

--vs--

WINANT V.P.BRADLEY.

MEMORANDUM FOR DEFENDANT UPON SETTLEMENT OF DECREE.

Counsel for defendant has prepared and submits herewith a form of Decree proposed to the Court.

This Decree is believed to follow exactly the extent and form of the findings of the Court set forth in the opinion handed down.

The Decree, proposed by the complainants on the contrary, would probibit things not decided by the Court to be invasions of the rights of the complainants and would be reversable upon the very opinion which it would purport to follow.

The Court expressly declines to hold that articles of merchandise may not be copied and the copies sold, basing the decision of the case upon certain representations and conduct.

These things so found unlawful are prohibited in the form of decree submitted on behalf of defendant, and the exercise of the restraining power of the Court should be so limited.

A court of equity in entering an order for an injunction will not restrain the defendant save from the mischief which is the ground for the decree, or beyond the things which are necessarily parts of the acts to be prohibited.

The injunction should not extend beyond the necessities of the case.

Hubbard vs. Miller 27 Mich 15; 15 Am. Rep. 153.

Creek Valley Electric R. Co. 179 Pa. St. 584; 36 Atl. 348.

Hutchinson v. Sandcraft 4 W.Va. 312.

The injunction should not be so broad as to prevent defendant from exercising his rights.

Simmons v. Mc.Phaul 117 G. 751; 45 S.E.76.

Myers v. Kalamazoo Buggy Co.54 Mich.215; 19 N.W. 961; 20 N.W.545; 52 Am.Rep. 811.

Clark Carriage Co. vs. Smith--Eggers Co. 3 Ohio & C. Pl. Dec. 77, 1 Ohio N.P. 391.

Martin vs. Platte Valley Sheep Co. 12 Wyo. 432; 76 Pac. 571; 78 Pac. 1093.

Grigler v. Mexico 101 Mo. App. 624; 74 S.W. 384.

Loomis vs. Thirty-fourth St. R. Co. 38 Hun.517.

Morgans Appeal 43 Leg. Int. (Pa.) 282.

It should not impose a greater restraint than is necessary.

Shubert v. Angeles 80 N.Y. App. Div. 625; 80 N.Y. Supp. 146.

New York Fire Dept. v. Bandit 4 N.Y. Supp. 206; 21 Abb. N.C. 164.

This suit being one to restrain unfair competition in trade, the Court will not interfere with any property or rights which are capable of unobjectionable uses.

In a suit like the present, in which the Court is announcing new applications of the general principles of the law, it should not penalize a defendant who honestly relied upon a different view of the extent of the rights of complainant.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

WALDO G. MORSE.
Solicitor for Defendant.

IN THE CIRCUIT COURT OF THE UNITED STATES
For the Eastern District of New York.

FONOTIPIA LIMITED and THE
COLUMBIA PHONOGRAPH COMPANY
(GENERAL)

vs. In Equity.

WINANT V. P. BRADLEY.

COMPLAINANTS' MEMORANDUM UPON SETTLEMENT OF DECREE.

We served our proposed form of Decree upon defendant's counsel on August 9th, 1909, making the same returnable on August 13th; but, at the request of defendant and of the Clerk of this Court, the matter was put over until to-day, August 27th. When complainants' counsel appeared in Court, he for the first time received the form of Decree proposed by the defendant, consequently we have had no earlier opportunity to prepare any objection to the same.

By leave of Court given counsel orally this afternoon, we submit herewith our reasons in support of our own form of Decree and in opposition to defendant's proposed form. The meat of the matter is found in the enjoining paragraph on page 2 of both forms and in the clause at the top of page 3 of defendant's form.

Should defendant's form of Decree be accepted, this entire litigation would have been thrown away and the decision rendered by the Court would be absolutely worthless.

In his argument, defendant's counsel justified defendant's actions on the ground that defendant was stating frankly to the public that his records were dup-

licates of the original records produced by such and such artists.

Now, however, in his form of decree, defendant proposes to continue to pirate our property, provided only he refrains from stating to the public that his copies "are duplicates of said originals", - that his copied records "are equal to the original in all respects", - and that "it is impossible to distinguish them from those produced by complainant".

In short, defendant asks to be permitted to continue to pirate our specially-executed sound-records, putting out his counterfeit records without giving any one credit for executing the same, and implying that defendant himself made the record from start to finish. And, it would seem to follow from his contentions that, if he could succeed in improving the quality of his out-put, - he could in that case truthfully (and lawfully) advertise that they are copies of ours and as good as ours.

Defendant's form of decree would imply that a poor imitation of the genuine article is unlawful, while a perfect imitation is lawful; that an inferior workman is a wrong-doer while a clever copier is free to pursue his counterfeiting. The test of legality suggested lies in the degree of skill possessed by the wrong-doer! The only thing enjoined would be a minor detail of advertising-matters.

On the other hand, in support of our form of decree, the facts in this case show and the Court has held, that complainants have established and are now maintaining a legitimate business in the manufacture and sale of our specially-executed sound-records; and that the defendant

has been guilty of unfair competition, in preying upon our said business by his wholesale copying of our genuine records, at a trifling expense to himself where it cost us large sums to produce the originals. The defendant has no right to make such use of our property, the result of our expenditures and skill.

Defendant has no right to the sentence on the top of page 3 of his proposed form, viz:

> "But nothing herein contained shall be construed as preventing the defendant from reproducing any of the records so as aforesaid manufactured by the COMPLAINANTS, or selling the same, save in the manner above enjoined."

The idea is preposterous. According to defendant's views, if he modifies the phraseology of his advertisements, he can proceed as before. In that case, this entire litigation would be a waste of time. We submit that the manner of advertising was merely incidental. The gist of the case and the gravamen of the offense is the wholesale copying of our sound-records.

Dated New York City,
August 27, 1909.

Respectfully submitted,
Philip Mauro
C.A.L. Massie,

Of Counsel for Complainants.

A copy of this Memorandum has been mailed to Mr. Morse.

At a Stated Term of the Circuit Court of the United States for the Eastern District of New York, held in the Court Rooms thereof in the Post Office Building, Borough of Brooklyn, City of New York, this 31st day of August, 1909.

PRESENT:

HON. THOMAS I. CHATFIELD,
U. S. Judge. Holding the Court.

FONOTIPIA LIMITED and THE COLUMBIA PHONOGRAPH COMPANY (GENERAL)

vs.

WINANT V. P. BRADLEY.

In Equity.

Unfair Competition in Copying Sound-Records.

INTERLOCUTORY DECREE.

This cause coming on to be heard upon Bill of Complaint, Answer, Replication, and proofs (in the form of affidavits and exhibits made by stipulation the record and testimony [illegible] final hearing); and C. A. L. MASSIE, ESQ., for complainants and WALDO G. MORSE, ESQ., for defendant, having been heard both orally and by written briefs; and the Court being fully advised in the premises it is this day

ADJUDGED, ORDERED and DECREED as follows:

1. The complainants, Fonotipia Limited and The Columbia Phonograph Company (General) are corporations as alleged in their Bill and are entitled to maintain this suit; and the defendant Winant V. P. Bradley is subject to the jurisdiction of this Court.

2. The complainants have built up and are maintaining in this country a legitimate and valuable business and good-will in the manufacture and sale of sound-records containing musical selections specially executed for complainants; and said business constitutes a valuable property-right entitled to protection by a Court of Equity.

3. The defendant Winant V. P. Bradley has caused copies or duplicates or counterfeits of complainants' said specially-executed sound-records to be made, the same having been designated "Continental Records", and has sold said Continental Records to the public as duplicates of the originals; and has thereby unfairly availed himself of complainants' property, and has to that extent diverted to himself the legitimate business which should and otherwise would go to complainants, to the injury of complainants' said business and good-will.

IT IS FURTHER ADJUDGED, ORDERED and DECREED, that the said defendant Winant V. P. Bradley, his associates, attorneys, privies, agents, clerks, servants, and workmen, and each of them, be perpetually enjoined from either directly or indirectly copying or duplicating or counterfeiting any for commercial purpose

sound-record made, or put out, by the complainants or either of them, - and from either directly or indirectly selling or offering to sell such copies or duplicates or counterfeits, - and from in any manner either directly or indirectly by making dealing in or handling said copies duplicates or counterfeits attempting to divert to themselves, or otherwise unlawfully injuring, the business and good-will built up and now maintained by the complainants as aforesaid.

IT IS FURTHER ADJUDGED, ORDERED and DECREED, that the said defendant Winant V. P. Bradley, his associates, attorneys, privies, agents, clerks, servants, and workmen, and each of them deliver up to the custody of this Court, for destruction, or such other disposition as this Court may hereafter order, any and all of the aforesaid unlawful sound-records (whether designated as "Continental" or otherwise), and any and all matrices and other appliances for making the same, that may be in the possession or under the control of them or any of them, - and likewise any and

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all advertising matter, catalogues, or the like, relating to said counterfeit sound-records.

IT IS FURTHER ADJUDGED, ORDERED and DECREED - that this cause be referred to for the convenience of the Court B. Lincoln Bennett one of the Masters of this Court for an accounting between complainants and the said defendant Winant V. P. Bradley, with instructions to said Master to report to this Court with all convenient speed the extent of defendant's unlawful acts aforesaid, the amount of profits received, and likewise the amount of complainants' damages in the premises; and to this end the Master is empowered and instructed to cause the defendant Winant V. P. Bradley to appear personally before him, to examine witnesses ore tenus and otherwise, to compel the production of books and papers, and is xx clothed with the usual powers of Masters in accountings in equity.

IT IS FURTHER ADJUDGED, ORDERED and DECREED that this Court retain jurisdiction of this cause to enable complainants to bring in as party or parties defendant the manufacturer or manufacturers of the said unlawful "Continental Records" when discovered.

IT IS FURTHER ADJUDGED, ORDERED and DECREED that defendant pay to complainants the amount of profits and damages reported by the Master; and that complainants have execution for the same and for their taxable costs and disbursements herein.

Thomas D. Thacher
U. S. Judge.

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This is to Certify that the within Writ of Injunction was personally served on the within named Winant V. P. Bradley, on the 3rd day of Sept. 1909 at his residence No 3518 Ave I. Brooklyn NY, by showing him the original and leaving with him a Copy thereof.

Charles J. Hambort
U. S. Marshal
Eastern Dist of NY

Sept 3rd 1909

U. S. Circuit Court,
Eastern Dist. of N. Y.
Eq 5/92

ORIGINAL

Fonotipia Limited and
Columbia Phonograph Co. (Genl)
vs.
Winant V. P. Bradley

In Equity

Writ of Injunction

C. A. L. Massie,
Tribune Bldg.
Manhattan Borough
N.Y. City
for Complts.

Filed September 14, 1909

3518 [illegible]

THE PRESIDENT OF THE UNITED STATES OF AMERICA to WINANT V. P. BRADLEY, his associates, attorneys, privies, agents, clerks, servants, and workmen, and each of them,

GREETING:

WHEREAS it has been represented to us in our Circuit Court of the United States for the Eastern District of New York, by the Bill of Complaint filed against you by the FONOTIPIA LIMITED and THE COLUMBIA PHONOGRAPH COMPANY (GENERAL), and by the Decree of this Court dated and entered herein on the 31st day of August, 1909, that you, WINANT V. P. BRADLEY, have caused copies or duplicates or counterfeits of complainants' said specially-executed sound-records to be made, the same having been designated "Continental Records", and have sold said Continental Records to the public as duplicates of the originals; and have thereby unfairly availed yourself of complainants' property, and have to that extent diverted to yourself the legitimate business which should and otherwise would go to complainants, to the injury of complainants' said business and good-will;

NOW, THEREFORE, we do strictly command, enjoin and restrain you, the said WINANT V. P. BRADLEY, and your associates, attorneys, privies, agents, clerks, servants, and workmen, and each of you, until further order of this Court, from either directly or indirectly copying or duplicating or counterfeiting for commercial purposes any sound-record made, or put out, by the complainants or either of them, - and from either directly or indirectly selling or offering to sell such copies or duplicates or counterfeits, - and from in any manner either directly or indirectly, by making, dealing in or handling said copies, duplicates or

counterfeits, attempting to divert to yourselves or otherwise unlawfully injuring, the business and good-will built up and now maintained by the complainants as aforesaid.

WITNESS the HONORABLE MELVILLE W. FULLER, Chief Justice of the United States, at the Federal Building, Borough of Brooklyn, City of New York, this 2nd day of September, 1909.

B. Lincoln Benedict
Clerk.
by J. G. Cochran Deputy Clerk.